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# Illegal Occupation: Framing the Occupied Palestinian Terrorty

By

Orna Ben-Naftali, Aeyal M. Gross & Keren Michaeli\*

*... If all time is eternally present  
All time is unredeemable.  
What might have been is an abstraction  
Remaining a perpetual possibility  
Only in a world of speculation.  
T.S. Eliot, Burnt Norton*

## I.

### INTRODUCTION

#### *A. The Missing Question of the Legality of an Occupation*

Is the continued Israeli occupation of the Palestinian territory conquered in 1967 legal or illegal?<sup>1</sup> We explore this question in this Article. Curiously, amongst the wealth of legal writings on various aspects of this occupation, most concern Israel's compliance or noncompliance with its obligations as an occupy-

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1. In August 2005, Israel pulled out its settlements and military forces from the Gaza Strip. The question whether this amounts to the end of the occupation in this area remains open and its determination depends on factual and legal considerations relating to the notion of "effective control," which are beyond the scope of this article. Even if one assumes that Gaza is no longer occupied, our discussion applies to the rest of the Palestinian territory, which Israel continues to occupy, i.e. the West Bank including East Jerusalem, which constitutes a far more substantial area both in terms of territory and the extent of Jewish settlements.

ing power; virtually no attention has been paid to the question of the legality of the occupation itself.<sup>2</sup>

Indeed, when the Secretary-General of the United Nations, in a statement to the Security Council on March 12, 2002, called on Israel to “end the illegal occupation,”<sup>3</sup> critics accused him of engaging in a “redefinition of the Middle East conflict . . . . A new and provocative label of ‘illegality’ is now out of the chute and running loose.”<sup>4</sup> This genie, however, was soon put back in the bottle, when the spokesman for the Secretary-General clarified that the word “illegal” referred to Israel’s refusal to accept the legal obligations that the status of an occupying power entails and to its actions running contrary to these obligations, actions that both the Security Council and the General Assembly have declared illegal.<sup>5</sup> The discourse thus appeared to resume its habitual focus on *specific actions undertaken within* the occupation, as distinct from *the nature of* the occupation as a normative regime. Even the recent advisory opinion rendered by the International Court of Justice (ICJ), *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,<sup>6</sup> while critical of both this construction and the related settlement enterprise, and decreeing their illegality, still focused on specific actions by Israel without questioning the legality of the occupation regime as such.

The virtual immunity from critical discussion conferred on the regime of this occupation cannot be explained away on political grounds. Indeed, the Israeli occupation has been subject to a widespread political and moral critique, both internationally and domestically. The reason lies in the perception of the occupation as a factual, rather than a normative, phenomenon. Thus posited, the fact of occupation generates normative results—the application of the international laws of occupation—but in itself does not seem to be part of that, or any other, normative order.

One might understand this practically axiomatic perception in three ways. First would be to conceive of the phenomenon of occupation as a fact of power,

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2. A search in Lexis-Nexis on the Israeli occupation of the occupied Palestinian territory generated 171 entries concerned with various Israeli actions and positions as an occupying power, and no entry relative to the legality of the very occupation itself. Similar results were obtained from Westlaw. Note further that, since 1999, the term “occupied Palestinian territory” (hereinafter “OPT”), is gradually substituting the terms “the West Bank, Gaza Strip and East Jerusalem” and “Palestinian occupied territories” in the terminology of the United Nations referring to the areas occupied by Israel since 1967, to connote the contiguous nature of the area where the Palestinians are entitled to exercise their right to self-determination. See, e.g., G.A. Res. ES-10/6, U.N. GAOR, 52d Sess., Supp. No. 494, U.N. Doc. A/ES-10/6 (1999).

3. Press Release, Security Council, Secretary-General Tells Security Council Middle East Crisis ‘Worst in Ten Years’; Calls on Palestinians, Israelis to ‘Lead Your Peoples Away From Disaster,’ U.N. Doc. SC/7325 (March 12, 2002).

4. George P. Fletcher, *Annan’s Careless Language*, NY TIMES, March 21, 2002, at A37.

5. Frederic Eckhard, Letter to the Editor, *A Delicate Word in the Mideast*, NY TIMES, March 23, 2002, at A16.

6. 2004 I.C.J. 131 (Jul. 9), at <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm> [hereinafter *Construction of a Wall*]. There are various terms used to describe this construction, for example *fence* and *separation barrier*. We use the term “Wall” in accordance with the ICJ’s language in this advisory opinion.

a kind of *Grundnorm*, which itself is grounded in an extra-legal domain.<sup>7</sup> A second alternative is to situate the phenomenon as legally permissible absent a norm prohibiting occupation.<sup>8</sup> A third option is to identify a norm that governs the phenomenon, differentiating between a legal and an illegal occupation. This identification involves a legal construction relating to both the normative order an occupation generates and to the normative order that generates the legal regime of occupation.

The first two perspectives presuppose an answer to the question this article seeks to answer, but each is problematic. The barren beauty of Kelsian formalism, underlying the first option, offers a vision of law far too narrow to account for the substantive interaction of form with function, structure with substance, fact with norm, and power with law.<sup>9</sup> The splendid "majesty of law,"<sup>10</sup> implicit in the second option, is equally deceptive by purporting to subject power to law in a manner that may well disregard the many other ways and means of their interaction.<sup>11</sup> Both perspectives thus generate the same troubling results: international law becomes an apology for power,<sup>12</sup> and the very phenomenon of occupation is excluded from a critical legal review. Such exclusion is an invitation for excessive power.

This article posits the third approach. This approach locates the occupation within a normative framework that differentiates between legality and illegality and may both resolve the specific question of the legality of the Israeli occupation and redefine the contours of the legal discourse on occupation.

### B. The Thesis and Structure of the Article

The underlying principle of the international legal order rests on a pre-

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7. HANS Kelsen, *GENERAL THEORY OF LAW AND STATE* 116 (1945). The text above does not suggest that Kelsen would have regarded occupation as a basic norm, which is therefore not subject to the test of validity. On the contrary, under Kelsen's theory, occupation would be considered a legal norm within a normative system the basic norm of which authorizes the creation by States of customary and conventional international law.

8. *The Case of the S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (Ser. A) No. 10, at 18 (Sep. 7).

9. For a critique of Kelsen's pure theory of law, see, for example, J. W. HARRIS, *LEGAL PHILOSOPHIES* 59-75 (1980); Ronald Dworkin, *Comments on the Unity of Law Doctrine (A Response)*, in *ETHICS AND SOCIAL JUSTICE* 200 (Howard E. Kiefer & Milton K. Munitz eds., 1970); Herbert L.A. Hart, *Kelsen's Doctrine of the Unity of Law*, in Kiefer & Munitz 171-99; JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF THE LEGAL SYSTEM* 93-120 (1980 ed.) (1970).

10. Justice Oliver Wendell Holmes coined this term in an address reprinted in *The Path of Law*, 10 HARV. L. REV. 457 (1897). The conception of law implied in this alternative is majestic, or reflective of imperialistic positivism, inasmuch as it conceives of the law as governing all human actions, either forbidding—or authorizing—each and every action, thereby rejecting the theoretical possibility of legal lacunae.

11. Such interaction is one of the major elements comprising the Critical Legal Studies (CLS) critique of legal liberalism. See, e.g., DUNCAN KENNEDY, *A CRITIC OF ADJUDICATION: FIN DE SIECLE* (1997). In the context of international law, see MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (1989).

12. In reference to Koskeniemi's terms, see *id.* See also Martti Koskeniemi, *The Politics of International Law*, 1 EUR. J. INT'L L. 4 (1990).

sumption of sovereign equality between states.<sup>13</sup> Current international law understands sovereignty to be vested in the people, giving expression to the right to self-determination.<sup>14</sup> Analytically, the phenomenon of occupation challenges this standard order by severing the link between sovereignty and effective control in the occupied territory.<sup>15</sup> This exceptional situation is thus not merely factual, it is also normative because it exists only by virtue of the norm's suspension.<sup>16</sup>

The international law of occupation enters the picture signifying both the need to distinguish between order and chaos and the need to distinguish between orders: between the rule and the exception. In distinguishing between order and chaos, the function of international law is to manage the situation; to eliminate chaos through control of the exceptional situation. In distinguishing between orders, its function is to create an orderly space which is defined by its exceptionality—by its suspension of the rule.

We argue that the legality of the phenomenon of occupation, as it relates to the function of managing the situation, is to be measured in relation to three fundamental legal principles:

(a) Sovereignty and title in an occupied territory are not vested in the occupying power. The roots of this principle emanate from the principle of the inalienability of sovereignty through actual or threatened use of force. Under contemporary international law, and in view of the principle of self-determination, sovereignty is vested in the population under occupation.<sup>17</sup>

13. Enshrined in Article 2(1) of the Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153 (1945).

14. See Eyal Benvenisti, *The Security Council and the Law of Occupation: Resolution 1483 on Iraq in Historical Perspective*, 1 IDF L. REV. 19, 28 (2003) [hereinafter Benvenisti, *Resolution 1483*]. On the right to self-determination, see *infra* notes 17, 76-86 and accompanying text.

15. This notion of suspension was already recognized in the first attempt to codify the international law of occupation, in the *Final Protocol and Project of an International Declaration Concerning the Laws and Customs of War*, Aug. 27, 1874, reprinted in *THE LAWS OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS* 26-34 (Dietrich Schindler & Jiri Toman eds., 3d ed. 1988) [hereinafter Brussels Declaration]. See *infra* notes 237-43 and accompanying text.

16. The tension between the rule and the exception formed one of the basic tenets of Carl Schmitt's critique of the liberal state and, indeed, of the very rule of law. See CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (George Schwab trans., 1988) [hereinafter SCHMITT, *POLITICAL THEOLOGY*]. A critical discussion of Schmitt's concept of "the exception" is offered in Section II.B *infra*.

17. Traditionally, sovereignty was attached to the state that held title to the territory prior to the occupation. Currently, the focus has shifted to the rights of the population under occupation. See generally Benvenisti, *Resolution 1483*, *supra* note 14. Note that a potential tension may be generated by this shift in focus between the state which held the territory prior to occupation and the population under occupation. Under current international law, this tension may be solved either generally by recognizing the primacy of the right to self-determination of the people or, in a more constricted fashion, by a determination whether the latter are entitled to an external or merely to an internal self-determination. On the differences between external and internal self-determination, see James Crawford, *The Right to Self-Determination in International Law: Its Development and Future*, in *PEOPLES RIGHTS* 7-67 (Philip Alston ed., 2001). In the case at hand, given both Jordan's dissociation from the West Bank and the widespread recognition of the Palestinian right to self-determination, it is clear that the sovereignty lies with the Palestinian people. For a review of the

(b) The occupying power is entrusted with the management of public order and civil life in the territory under control. In view of the principle of self-determination, the people under occupation are the beneficiaries of this trust. The dispossession and subjugation of these people violate this trust.<sup>18</sup>

(c) Occupation is temporary.<sup>19</sup> It may be neither permanent nor indefinite.

These principles, as we will show, interrelate: the substantive constraints on the managerial discretion of the occupant elucidated in principles “(a)” and “(b)” generate the conclusion in “(c)” that occupation must necessarily be temporary. Violating the temporal constraints expressed in principle “(c)” cannot but violate principles “(a)” and “(b),” thereby corrupting the normative regime of occupation in the sense that an occupation that cannot be regarded as temporary defies both the principle of trust and of self-determination. The violation of any one of these principles, therefore, unlike the violation of a specific norm that reflects them,<sup>20</sup> renders an occupation illegal *per se*. This is the nature of the Israeli oc-

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U.N.’s recognition of the Palestinian right to self-determination, see ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REPRISAL 238-39 (1995) [hereinafter CASSESE, SELF-DETERMINATION]. As Casseese notes, “practically all states (and inter-governmental organizations) except Israel, take the view that the Palestinians are entitled to self-determination.” *Id.* at 240. See also Frances Raday, *Self-Determination and Minority Rights*, 26 FORDHAM INT’L. L. J. 453 (2003) (discussing the right to self-determination of both Jews within Israel’s 1948 Armistice Line and Palestinians in the West Bank and Gaza). Raday distinguishes the right to self-determination from the minority rights of Israeli-Palestinians and of Jews living in the West Bank and Gaza. It is important to note that Israel itself seems to have recognized this right, albeit implicitly, at least since the Oslo Accords of 1993, as can be inferred from both the text and the context of the Declaration of Principles signed between Israel and the PLO in 1993. CASSESE, SELF-DETERMINATION, at 243-45; Israeli-Palestine Liberation Organization: Declaration of Principles on Interim Self-Government Arrangements, Sept. 13, 1993, 32 I.L.M. 1525 (1993). Article 3(1) stipulated that elections for the Palestinian Interim Self-Government Authority will be held “[i]n order that the Palestinian people in the West Bank and the Gaza Strip may govern themselves according to democratic principles.” Article 3(3) states, “[t]hese elections will constitute a significant interim preparatory step toward the realization of the legitimate rights of the Palestinian people and their just requirements.” *Id.* at art. 3(2); see also U.S. Department of State, A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict, Apr. 30, 2003, available at <http://www.state.gov/t/pa/prs/ps/2003/20062.htm> (acknowledging Israel’s acceptance of the idea of “an independent, democratic, and viable Palestinian state” as part of the Middle East Roadmap); Statement by Prime Minister Ariel Sharon After the Aqaba Summit Meeting, June 4, 2003, Israeli Ministry of Foreign Affairs, at <http://www.mfa.gov.il/MFA/Government/Speeches+by+Israeli+leaders/2003/> (“Israel . . . has lent its strong support for President’s Bush’s vision . . . of two states—Israel and a Palestinian state—living side by side in peace and security . . . It is in Israel’s interest . . . for the Palestinians to govern themselves in their own state.”). In the *Construction of a Wall* Advisory Opinion, the Palestinian right to self-determination was explicitly recognized, the Court opining that “the existence of a ‘Palestinian people’ is no longer in issue,” and noting that Israel itself has recognized this right. *Construction of a Wall*, *supra* note 6, ¶ 118. It is significant in this context to note that the Court further discussed Israel’s right to exist peacefully, side by side with a Palestinian state. *Id.* ¶¶ 71, 162.

18. A discussion of the principle of trust as embedded in the normative regime of occupation is offered in Section II.A.3 *infra*.

19. See *Construction of a Wall*, *supra* note 6, Separate Opinion of Judge Elaraby, ¶ 3.1; Separate Opinion of Judge Koroma, ¶ 2. A discussion of the temporal constraints of the normative regime of occupation is offered in Section II.A.4 *infra*.

20. Article 53 of the Fourth Geneva Convention, for example, prohibits the destruction by

cupation of the Occupied Palestinian Territory (OPT). Section II.A: Intrinsic Dimensions of the Israeli Occupation of the OPT, substantiates this argument.

We further argue that the legality of occupation, in its function to create an orderly space that is nevertheless distinct from the normal political order of sovereign equality between states, is to be measured by its exceptionality: once the boundaries between the normal order (i.e., sovereign equality between states) and the exception (i.e., occupation) are blurred, an occupation becomes illegal. The nexus between the two functions is clear: an occupation that is illegal from the perspective of managing an otherwise chaotic situation is also illegal in that it obfuscates the distinction between the rule and its exception. Yet, the distinction between these two forms of illegality is important; the former is grounded in the intrinsic principles of the law of occupation, while the latter is extrinsic to this law and delineates its limits. The Israeli occupation of the OPT is illegal both intrinsically and extrinsically. Section II.B: Extrinsic Dimensions of the Israeli Occupation of the OPT, substantiates this argument.

The concluding section (III) of this article focuses on the indeterminacies of this occupation as reflecting both its essential feature and its legitimizing mechanism, and proceeds to consider the normative consequences of an illegal occupation.

It is worthwhile to recall that the ICJ has already determined the illegality of one historic occupation: the presence of South Africa in Namibia following the revocation of the mandate by the General Assembly.<sup>21</sup> The Court started with the historical fact of South Africa's presence in Namibia (then called South

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the occupying power of "real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations . . . , except where such destruction is rendered absolutely necessary by military operations." This provision is a specific norm: it specifies an element of the occupant's responsibility as a trustee in the occupied territories. A destruction of a house may thus be in violation of this norm, but such a violation in and of itself does not undermine the underlying principle of trust.

21. This was followed by a decision of the Security Council that declared the continued presence of South Africa in Namibia to be illegal. See S.C. Res. 276, U.N. SCOR, 25th Sess., Res. & Dec. at 1, 2, U.N. Doc. S/INF/25 (1970). See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276* (1970), 1971 I.C.J. 16 (June 21) [hereinafter *Continued Presence of South Africa in Namibia* Advisory Opinion]. Note that the Court's reasoning emanated from the revocation of the Mandate. The separate opinion of Vice President Ammoun, however, emphasized that the Court's reasoning was not limited to the violations of the stipulations of the Mandate and gave due consideration to the right of peoples to self-determination as well as to violations of human rights of the people of Namibia by the South African authorities. See Separate Opinion of Vice President Ammoun, *id.* at 71-72. Note further that in the *Construction of a Wall* Advisory Opinion, *supra* note 6, the ICJ's historical narrative of the events leading to the construction of the Wall emphasized that the territory used to be a mandate and the Opinion contains several references to, and draws analogies from the *Continued Presence of South Africa in Namibia* Advisory Opinion. See *id.* at ¶¶ 70, 88. Several of the judges who appended separate opinions took exception to this analogy. See Separate opinion of Judge Higgins, *id.* at ¶ 2; Separate opinion of Judge Kooijmans, *id.* at ¶ 33. The merits of the analogy notwithstanding, it should be noted that whereas in the case of South Africa's presence in Namibia the Court was asked to opine on the nature of the presence itself, the question relative to the Palestinian territory did not focus on the nature of the Israeli presence therein, that is, on the occupation, but rather on the legality of a specific action undertaken in its context.

West Africa) and then proceeded to deduce the illegality of that continuing presence from various pertinent components that had characterized this fact.<sup>22</sup>

Our inquiry proposes to complement this type of historical approach with an analytical perspective that focuses on the legal and political structure of the phenomenon of occupation. We hope that this discussion will advance the current discourse on the legality of occupation regimes.

### *C. Current Discourse on the Legality of Occupation Regimes*

The current discourse on the legality of occupation regimes is in dire need of development and articulation. The occupation of Iraq indicates that the phenomenon of occupation, far from becoming obsolete, is revived. It now claims legitimacy on the basis of purposes inherently at odds with belligerent occupations; that is, the liberation of a people from an abusive regime.<sup>23</sup> At the same time, the little discussion the issue has generated thus far seems both polarized and lacking specificity. Thus, the inherent tension between the right to self-determination and the legality of occupation has led Antonio Cassese to conclude that “self-determination is violated whenever there is a military invasion or belligerent occupation of a foreign country, except where the occupation—*although unlawful*—is of a minimal duration or is solely intended as a measure of repelling, under Article 1 of the UN Charter, an armed attack initiated by the vanquished Power and consequently is not protracted.”<sup>24</sup> This view, then, regards all occupations as inherently unlawful, but admits that the legitimacy of the initial act—the use of force in self-defense—may provide a legal justification for an occupation’s existence, subject to a strict, albeit unspecified, temporal limitation.<sup>25</sup>

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22. See *infra* notes 152-60 and accompanying text.

23. Since occupation is perceived as a fact rather than as a norm, the discourse surrounding the invasion and occupation of Iraq focused primarily on the legality and legitimacy of the *use of force* by the U.S. and not on that of the *occupation*. Underlying these arguments, however, is the implicit presumption that the legitimacy accorded to the U.S. action extends to the occupation itself. Thus, writes Anne-Marie Slaughter, “the United States and its allies can justify their *intervention* if the Iraqi people welcome their coming and if they turn immediately back to the United Nations to help rebuild the country.” Anne-Marie Slaughter, *Good Reasons for Going Around the UN*, N.Y. TIMES, MAR. 18, 2003, at A33 (emphasis added). For criticism, see Richard A. Falk, *Future Implication of the Iraq Conflict: What Future for the UN Charter System of War Prevention?*, 97 AM. J. INT’L L. 590, 596-97 (2003). Falk criticizes claims that a regime change constitutes a legal basis for humanitarian intervention. See also David J. Scheffer, *Future Implication of the Iraq Conflict: Beyond Occupation Law*, 97 AM. J. INT’L L. 842, 851 (2003) (indicating that because the law of occupation is ill-suited for the purposes of changing a regime or rebuilding a country, a nation-building policy by the U.N. rather than a U.S. occupation is required).

24. CASSESE, SELF-DETERMINATION, *supra* note 17, at 99 (emphasis added).

25. Cf. Judge Elaraby, *Construction of a Wall*, *supra* note 6, Separate Opinion of Judge Elaraby, ¶ 3.1. Judge Elaraby cites with approval an article authored by Professors Richard Falk and Burns Weston, which argues that “[o]ccupation, as an illegal and temporary situation, is at the heart of the whole problem.” Judge Elaraby does not explain why an occupation is illegal and does not make a connection between its temporary duration and illegality. His reliance on Falk and Weston suggests that the illegality stems from the original act of force that generated the occupation. For a more detailed discussion of this argument, see Richard A. Falk & Burns H. Weston, *The Relevance*



A different position, recently advanced by Eyal Benvenisti, posits that the notion of "illegal occupation" could amount to "major qualifications if not a revolution in the law of occupation."<sup>26</sup> This notion, observes Benvenisti, has its roots in various international documents, wherein an occupation was grouped together with unlawful modalities of governance such as colonialism and apartheid.<sup>27</sup> The latter, however, should not be read as advocating the outlawing of the modality of occupation in its entirety. Rather, only an occupant who uses this modality as an indefinite grant of power and refuses to negotiate its withdrawal "abuses its power and might taint its continuing presence in the occupied territory with illegality."<sup>28</sup> An occupation that has not been thus abused retains its legal validity. Support for this limited notion of illegality, says Benvenisti, is found in Security Council Resolution 1483 of May 22, 2003, which recognized the authorities, responsibilities, and obligations under applicable international law of the "occupying powers" in Iraq, and called upon "all concerned to comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907,"<sup>29</sup> thereby reviving the neutral connotation of the doctrine of belligerent occupation and relieving it of its derogatory undertone.<sup>30</sup>

Practice has echoed, to a large extent, this scholarly debate. Thus, the inherent tension between the full enjoyment of human rights and the situation of occupation has led the Special Rapporteur of the United Nations Commission of Human Rights, John Dugard, to conclude in one of his Reports on the Violation of Human Rights in the Occupied Arab Territories that "violations of human rights are a necessary consequence of military occupation."<sup>31</sup> Israel understood this conclusion to imply that, "while military occupation may not itself be inherently illegal, it necessarily leads to violations of human rights, and so presumably must be illegal, if not directly then at least indirectly. This remarkable legal thesis contravenes the entire body of humanitarian law dealing with belligerent

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*of International Law to Israeli and Palestinian Rights in the West Bank and Gaza, in* INTERNATIONAL LAW AND THE ADMINISTRATION OF OCCUPIED TERRITORIES 125, 146-47 (Emma Playfair ed., 1992).

26. Eyal Benvenisti, *Resolution 1483*, *supra* note 14, at 33.

27. Benvenisti lists the following documents: The Charter of Economic Rights and Duties of States of Dec. 12, 1974, G.A. Res. 3281, 29 U.N. GAOR, 29th Sess., Supp. No. 31, art. 16(1), at 52, U.N. Doc. A/9631 (1974)); GA Res. 3171, section 2, U.N. GAOR, 28th Sess., Supp. No. 30, at 52, U.N. Doc. A/9030 (1973); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 1(4), 1125 U.N.T.S. 3 [hereinafter Protocol I]; International Convention Against the Taking of Hostages, Dec. 18, 1979, art. 12(12), U.N. Doc. A/C.6/34/L.23, *reprinted* in 18 I.L.M. 1456 (1979). Benvenisti, *Resolution 1483*, *supra* note 14, at 32-33.

28. *Id.* at 34.

29. U.N. S/RES/1483 (2003), ¶ 5.

30. See Benvenisti, *Resolution 1483*, *supra* note 14, at 36-38.

31. See Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine, Report of the Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in the Palestinian Territories Occupied By Israel Since 1967 (A/57/366), Aug. 29, 2002, ¶ 21 [hereinafter 2002 REPORT ON THE VIOLATIONS OF HUMAN RIGHTS IN THE OCCUPIED ARAB TERRITORIES].

occupation.”<sup>32</sup>

The polarization evinced by the above positions underscores the need to clarify and develop the legal discourse and to refine the criteria by which we measure the legality of an occupation. Torn between the position that all occupations are inherently illegal and the position that an occupation is a neutral fact that defies any such characterization, the criteria that have been advanced in this context seem to focus on either the legitimacy of the initial act of occupation or on the legality of specific actions undertaken during the course of an occupation. The discussion further seems to refer to the duration of occupation but fails to specify or otherwise qualify this reference.

We propose to advance the discussion by positing that an occupation, while neither initially nor inherently illegal, is not neutral. Occasioned by, and extending the use of force—regardless of its initial justification and notwithstanding the prohibition on this use<sup>33</sup>—it is to be viewed and monitored critically, lest the much necessary law of occupation becomes a shield for the violation of its own extrinsic purpose and intrinsic principles. The specification of this purpose and these principles provide adequate criteria for determining the legality or illegality of any specific occupation. Lack of such criteria may well generate a legitimizing effect allowing this precarious, albeit not necessarily illegal, situation to indeed become illegal.

## II.

### THE LEGAL MATRIX OF OCCUPATION

#### *A. Intrinsic Dimensions of the Israeli Occupation of the OPT: the Norms of Occupation*

The Israeli occupation of the OPT violates the three basic tenets of the normative regime of occupation and is, therefore, intrinsically illegal. This section discusses the basic principles informing this normative regime and then applies them to the Israeli occupation. Sub-section (1), *The Evolving Concept of*

32. Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine, Note Verbale Dated 16 December 2002 from the Permanent Representative of Israel to the United Nations Office at Geneva Addressed to the Secretariat of the Commission of Human Rights, Commission of Human Rights, 59th Sess., E/CN.4/2003.G/21, ¶ 9, (Dec. 23, 2002) [hereinafter *Note From Israel to the U.N.*].

33. See in this context, Roberts' discussion of a possible grounding of an argument made by the Palestinians on the illegality of the Israeli occupation, in the presumed fact that Israel was an aggressor in 1967. Adam Roberts, *Prolonged Military Occupation: The Israeli Occupied Territories Since 1967*, 84 AM. J. INT'L. L. 44, 49-51 (1990) [hereinafter Roberts, *Prolonged Military Occupation*]. In his list of seventeen types of occupations, Roberts includes “illegal occupation” as a category, but puts this term within quotation marks, and raises a doubt about its validity, based on the ground that this term is used to refer to an occupation which is perceived as being the outcome of aggression. Adam Roberts, *What is a Military Occupation?*, 55 Brit. Y.B. INT'L. L. 249, 293-94 (1984) [hereinafter Roberts, *Military Occupation*]. Our argument about the illegality of occupation does not rest upon facts relating to the question of initial aggression. Such a position, as Roberts argues, is not tenable, given that the law of war, including the law of occupation, equally applies to all states, whether aggressors or victims of aggression.

*Occupation*, discusses the major cornerstones in the development of this normative regime and the extent of their applicability to the occupation at hand. Sub-section (2), *Occupation Suspends Sovereignty*, focuses on the first basic tenet of this regime, that is, that occupation does not confer title. Sub-section (3), *Trust Matters*, discusses the second basic principle of the normative regime of occupation, according to which an occupation regime is a form of trust under which the occupant, without forsaking its own security interests, is nevertheless obligated to act as a trustee on behalf of the occupied population. Sub-section (4), *Right on Time*, is concerned with the last basic principle of the normative regime of occupation, which decrees that an occupation must be temporary, as distinct from indefinite. In each sub-section, the normative conclusions generated by the discussion are then applied to the Israeli occupation of the OPT.

### 1. *The Evolving Concept of Occupation*

#### (a) *Defining the Phenomenon of Occupation*

The phenomenon of occupation is currently defined as “the effective control of a power (be it one or more states or an international organization, such as the United Nations) over a territory to which that power has no sovereign title, without the volition of the sovereign of that territory.”<sup>34</sup>

This widely accepted definition contains three notable features. First, it is expansive so as to cover varied types of occupation. The rationale behind this expansiveness is clear: the moment an occupation exists, the normative regime of occupation—which comprises a host of humanitarian rules—applies. This broad definition curbs the defiance of occupying powers who are reluctant to abide by those rules and deny that the specific situation qualifies as an occupation.<sup>35</sup> Israel’s rejection of the applicability of the Fourth Geneva Convention to the OPT, discussed below, underscores this point.<sup>36</sup>

Secondly, the definition incorporates the principle of the inalienability of sovereignty. This principle is the most fundamental tenet of the law of occupation in three senses. First, it indicates that occupation does not confer title.<sup>37</sup> Second, it recognizes that the situation of occupation is exceptional, as it deviates from the normal order of sovereign states insofar as it reflects the suspension of the link between sovereignty and effective control. It is this exceptionality, in turn, that defines both the substantive and the temporal nature of the relationship between the occupying power and the sovereign.<sup>38</sup> Taken together, these principles demarcate the boundaries of the phenomenon in relation to the

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34. EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 4 (1993) [hereinafter BENVENISTI, *LAW OF OCCUPATION*].

35. Richard R. Baxter, *Some Existing Problems of Humanitarian Law*, 14 *REVUE DE DROIT PENAL MILITAIRE ET DE DROIT DE LA GUERRE* 297, 298 (1975).

36. See *infra* notes 87-109 and accompanying text.

37. This principle is discussed in Section II.A.2 *infra*.

38. See *infra* sections II.A.3 (the trust principle) and II.A.4 (the temporal principle).

normal order of the international state system. Finally, the definition notably signifies that the phenomenon of occupation is currently understood in a manner quite distinct from its original conception. The remaining part of this sub-section describes briefly the legal evolution of the concept of occupation and the changing circumstances that have shaped and re-shaped it.

*(b) Historical Development of the Law of Occupation*

The evolution of the concept of occupation and the rules attached to it, like the development of the laws of war in general, reflects the general shift in international law away from a state-centric system toward the recognition and promotion of the role and rights of individuals. Indeed, the tension between rights of states and rights of individuals is the hallmark of the laws of war. It is thus unsurprising that early efforts to codify the law of belligerent occupation primarily concerned the rights and interests of states, often at the expense of individuals. The normative reflection of this concern found expression in the subjection of principles of humanity to those of military necessity.<sup>39</sup>

The Lieber Code,<sup>40</sup> commissioned by President Lincoln for training Union forces during the U.S. Civil War, is generally credited as the first milestone in the genesis of the law of belligerent occupation.<sup>41</sup> The Code clearly prioritizes military over humanitarian considerations: while it recognized minimum protection of the civilian population,<sup>42</sup> it also sanctioned starvation and bombardment of civilians without warning, when military necessity so required.<sup>43</sup>

The first international attempt to codify the law of belligerent occupation took place in Brussels in 1874, where delegates of seventeen European states convened to draft comprehensive regulations on warfare.<sup>44</sup> This effort generated a final declaration that was never ratified: the great powers viewed it as “too ‘humanitarian,’”<sup>45</sup> while the small nations considered the articles on occupation as detrimental to their interests in calling on their populations for aid in resisting

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39. Chris Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L. J. 49 (1994).

40. Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, Apr. 24, 1863, reprinted in Schindler & Toman, *supra* note 15, at 3 [hereinafter Lieber Code].

41. About one-third of the Code's provisions relate to belligerent occupation. See generally, DORIS A. GRABER, THE DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION 1863-1914—A HISTORICAL SURVEY 15 (1949).

42. Lieber Code, *supra* note 40, arts. 22-23, 34-38.

43. *Id.* at arts. 14, 15, 17, 19. Although the Code was issued during the Civil War, it was designed to cover international conflicts, as evidenced by the fact that the Union viewed the Confederate forces as *de facto* belligerent. See GRABER, *supra* note 41, at 18-19. Furthermore, between the years 1870 and 1893, other countries—including Prussia, the Netherlands, France, Russia, Serbia, Argentina, Great Britain and Spain—adopted similar manuals or codes. See LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 30 (2d ed. 2000).

44. Christopher Greenwood, *Historical Development and Legal Basis*, in THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 1, 10 (Dieter Fleck ed., 1995) [hereinafter Greenwood, *Historical Development*].

45. Jochnick & Normand, *supra* note 39, at 67.

invasions by larger armies.<sup>46</sup>

There was, however, some agreement on the definition of occupation. Article 1 of the Brussels Declaration defined occupation as a territory actually placed under the authority of a hostile army bounded by the territories around which it could establish and exercise authority.<sup>47</sup> There was no agreement as to the exact meaning of the term “actually placed under the authority.” Article 2 read, “[t]he authority of the legitimate Power being suspended and having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety.”<sup>48</sup> Thus defined, the concept of occupation mirrored nineteenth century European political consciousness: war was waged between sovereign states and the protected interests belonged to them.<sup>49</sup> Thus, the rights of the population took a back seat to the interests of the sovereign. As between states, however, the Brussels Declaration is notable for recognizing that the situation of occupation is one of *suspension*: the normal order of the international society wherein the legitimate sovereign exercises effective authority is suspended in relation to the occupied territory and population. It is not, however, terminated. The occupying power assumes responsibility for managing the occupied territory to prevent chaos for the duration of the occupation. This assumption does not, however, confer sovereignty on the occupier.

The definition of belligerent occupation survived the two subsequent codification projects of the laws of war in The Hague Conventions and their annexed Regulations. The Conventions were the products of two conferences held at The Hague in 1899 and 1907, and constituted a comprehensive, albeit incomplete,<sup>50</sup> codex of the laws of war.

The most relevant convention for this discussion is the 1907 Fourth Hague Convention and annexed Regulations,<sup>51</sup> which by WWII had attained customary status.<sup>52</sup> Article 42 of the 1907 Hague Regulations reiterated verbatim the definition of belligerent occupation expressed in Article 1 of the Brussels Declara-

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46. GRABER, *supra* note 41, at 24-25. Today, however, that section of the declaration that concerns occupation, which was not revised by later conventions, is regarded as customary and applicable to the Israeli occupation. See Greenwood, *Historical Development*, *supra* note 44, at 10.

47. Brussels Declaration, *supra* note 15, at 3.

48. *Id.*

49. David Goodman, *The Need for Fundamental Change in the Law of Belligerent Occupation*, 37 STAN. L. REV. 1573, 1591 (1985).

50. The preamble of Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, Oct. 18, 1907, Reg. 42, 36 Stat. 2277, 1 Bevans 631, states that: “It has not, however, been found possible at present to concert regulations covering all the circumstances which arise in practice.” [hereinafter: 1907 Hague Regulations].

51. *Id.*

52. *Judgment of the Nuremberg International Military Tribunal* (30 Sept. 1946), in 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL: NUREMBERG, 14 NOVEMBER 1945 – 1 OCTOBER 1946 411, 497 (1948). See also *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226, 257-58 (July 8) [hereinafter *Nuclear Weapons Advisory Opinion*]. This was the basis of the Israeli High Court of Justice decision to apply the Regulations to the Palestinian Occupied Territories. See H.C. 610/78, Oiev v. Minister of Defense, 33(2) P.D. 113.

tion.<sup>53</sup> Article 43 of the 1907 Hague Regulations stipulated that “the authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety/civil life, while respecting, unless absolutely prevented, the laws in force in the country.”<sup>54</sup> This provision became the cornerstone for the determination of the nature and scope of the occupant’s responsibility. That duty is of a temporary duration and the occupying power is to manage the territory in a manner that protects civil life, exercising its authority as a trustee of the sovereign.<sup>55</sup> Further protection of the occupied population was provided by the Regulations in respect of family honor and the rights to life, private property, and religious convictions and practices.<sup>56</sup> Pillage<sup>57</sup> and collective sanctions<sup>58</sup> were forbidden.<sup>59</sup>

Thus, modern occupation law traditionally recognized and regulated only belligerent occupation characterized by four main features: (a) the occupation is undertaken by a belligerent state; (b) it is over a territory of an enemy belligerent state; (c) it occurs during the course of war or armed conflict; and, (d) before any armistice agreement is concluded.<sup>60</sup> Also, the occupation extends only to those areas over which the occupant exercises effective control.<sup>61</sup> The assumption underlying this approach is that no other authority exists in the occupied area.<sup>62</sup> Further, control is measured by the authority’s ability to assume the primary responsibility that attaches to an occupying power: the ability to issue and enforce directives to the inhabitants of the territory,<sup>63</sup> or, in other words, the oc-

53. See also regulation 42 of the Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 1 Bevans 247.

54. Note that the language of the official French version refers to “l’ordre et la vie publique” and that the term “civil life” is more accurate and appropriate than the term “safety,” used in the English version. The term “civil life” is far broader than the term “safety” inasmuch as the former encompasses the entire commercial and social life of a country. See JOHN WESTLAKE, II INTERNATIONAL LAW: WAR 95 (2d ed. 1913). According to the preparatory work on the Brussels Declaration, which produced the original French term, the correct translation is “civil life” and not “safety” as the semi-official English translation put it. See Edmund H. Schwenk, *Legislative Power of the Military Occupant under Article 43, Hague Regulations*, 54 YALE L. J. 393, 393 n.1 (1945).

55. Arnold Wilson, *The Laws of War in Occupied Territories*, 18 TRANSACTIONS GROTIUS SOC’Y 17, 38 (1933); Roberts, *Military Occupation*, *supra* note 33, at 295. For a discussion of the principle of trust, see *infra* Section II.A.3 *infra*.

56. 1907 Hague Regulations, *supra* note 50, at art. 46.

57. *Id.* at art. 50.

58. *Id.*

59. For additional reference, see the preface to the 1899 Convention (II), *supra* note 53, which stated that the parties agree to “diminish the evils of war, as far as military requirements permit.”

60. The fact that the Conventions did not alter the definition of occupation is hardly surprising. According to Jochnick and Normand, while considered by many an important achievement in the effort to humanize war, the Conventions did not challenge the subjection of humanitarian concerns to military necessity. See Jochnick & Normand, *supra* note 39, at 68-77.

61. Roberts, *Military Occupation*, *supra* note 33, at 261.

62. See 1907 Hague Regulations, *supra* note 50, at art. 43.

63. Hans-Peter Gasser, *Protection of the Civilian Population*, in Fleck, *supra* note 44, at 209, 243.

cupant's ability to have its will prevail everywhere in the territory.<sup>64</sup>

This traditional definition of occupation proved unsatisfactory during WWII. For example, in cases where the occupied states encountered little, if any, armed resistance, or where the territories were not necessarily administered by the armed forces of the occupant, as was the case with Denmark and Czechoslovakia, the traditional definition of occupation was inadequate.<sup>65</sup> Furthermore, inadequate protection afforded to the occupied population was painfully evident throughout the war and highlighted the need for occupation law reforms.<sup>66</sup>

The four 1949 Geneva Conventions, of which the fourth Convention is the most relevant for the purposes of this discussion, were concluded in the light of lessons learned from WWII.<sup>67</sup> The second paragraph of Common Article 2 of the four Geneva Conventions expanded the applicability range of the laws of occupation by including therein that occupation has taken place even without a declaration of war and without hostilities.<sup>68</sup> Article 4 of the Fourth Geneva Convention then applies the Convention's provisions to "protected persons" who, either during an armed conflict or during an occupation, find themselves in the hands of a party to the Convention of which they are not nationals. The term "in the hands of" applies to persons who are not necessarily in the physical custody of the occupant. Instead, it pertains to all people present in the territory under the control of the occupant other than its own nationals or the nationals of its allies.<sup>69</sup> The Fourth Geneva Convention expanded not only the application of the rules of belligerent occupation, but also the duties incumbent on the occupant with respect to the civilian population, thus constituting a new and far broader bill of rights when compared to the previous Hague Conventions.<sup>70</sup> Thus, it is the protection of the occupied civilian population, rather than the facilitation of

64. GERHARD VON GLAHN, *THE OCCUPATION OF ENEMY TERRITORY* 29 (1957) [hereinafter VON GLAHN, *OCCUPATION*].

65. Roberts, *Military Occupation*, *supra* note 33, at 252.

66. VON GLAHN, *OCCUPATION*, *supra* note 64, at 16.

67. Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

68. See JEAN S. PICTET, COMMENTARY—THE GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN THE OF WAR 21 (1958). Article 2 reads as follows:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance. Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof. *Id.*

69. *Id.* at 46.

70. BENVENISTI, *LAW OF OCCUPATION*, *supra* note 34, at 105.

cilitation of governmental interests, which informs the Fourth Geneva Convention.<sup>71</sup> This is a clear shift of concern from governments to people.<sup>72</sup>

Still, under the Fourth Geneva Convention, the qualifications of situations which constitute occupation require some nexus to an armed conflict. Further, the Convention seemed to stipulate that the occupied territory should form part of the territory of another High Contracting Party.<sup>73</sup> Consequently, the rules enumerated in the four Conventions did not apply to any form of occupation other than belligerent occupation.<sup>74</sup> This also proved unsatisfactory. As the twentieth century drew to a close, other types of occupation surfaced, and the ever-heightened interest in protecting the civilian populations required that these new types of occupations also be subject to the provisions of the Fourth Geneva Convention.<sup>75</sup>

*(c) The Transition into the Contemporary Law of Occupation: the Growing Significance of Self-Determination*

The growing concern for the plight of civilians reflects two paradoxical yet interrelated facets of the latter half of the last century: the development of the international human rights discourse, and the undeniable recognition of the fact that wars are being waged against civilians rather than soldiers.<sup>76</sup> The growing significance of the right to self-determination reflects, to a large extent, an attempt by the international community to take account of both these developments. Already recognized in the UN Charter,<sup>77</sup> the two International Covenants on human rights,<sup>78</sup> several General Assembly resolutions,<sup>79</sup> and opinions rendered by the ICJ,<sup>80</sup> the right to self-determination produced a wave of interna-

71. PICTET, *supra* note 68, at 614.

72. BENVENISTI, LAW OF OCCUPATION, *supra* note 34, at 99-100.

73. The second paragraph of article 2 of the Fourth Geneva Convention refers to a territory of a High Contracting Party. Israel relied on this clause in support of its position that the Fourth Geneva Convention is inapplicable to the OPT. For more on this argument and a critique of its use, see *infra* notes 87-109 and accompanying text.

74. See VON GLAHN, OCCUPATION, *supra* note 64, at 27.

75. For a typology of occupations, see Roberts, *Military Occupation*, *supra* note 33, at 260-95.

76. World War II, Vietnam, Kosovo, Bosnia, and Rwanda, are but a few notable examples of this observation. See generally CHRIS HEDGER, WAR IS A FORCE THAT GIVES US MEANING 28 (2002).

77. United Nations Charter, *supra* note 13, at arts. 1, 55

78. International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 1(1), 999 U.N.T.S. 175, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1967) [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 1(1), 993 U.N.T.S. 3, G.A. Res. 2200A(XXI), 21 U.N. GAOR, art. 11(1), U.N. Doc. A/6316 (1967) [hereinafter ICESCR].

79. See, e.g., Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A/4684 (1960). See also *infra* note 81.

80. See *Continued Presence of South Africa in Namibia* Advisory Opinion, *supra* note 21, Separate Opinion of Vice President Ammoun, *supra* note 21; *Western Sahara*, 1975 I.C.J. 12, 31-33 (Oct. 16).



tional approval for the lawful struggle for self-determination of peoples subject to foreign domination—including occupation.<sup>81</sup>

It is against this backdrop that the development in occupation law as articulated in Article 1(4) of the First Additional Protocol of the Geneva Conventions should be read:

The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.<sup>82</sup>

Article 1(4) was designed to cover occupied territories severed either from a nonparty state or otherwise lacking clear international status.<sup>83</sup> The drafters of this First Additional Protocol ("Protocol") had, *inter alia*, the OPT in mind. Israel and a few other states—most notably, the United States—refused to join the Protocol.<sup>84</sup>

The controversy generated by Article 1(4) questioned the customary status of many of the Protocol's provisions<sup>85</sup> and blurred the contours of their application. This was detrimental to the ongoing development of international humanitarian norms, since the Protocol promoted humanitarian concerns over military necessity.<sup>86</sup> One must not, however, ignore the influence Article 1(4) has had on the law of occupation. As the Israeli example itself clearly demonstrates, inter-

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81. See Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc. A/8028 (1970) ("every state has the duty to refrain from any forcible action which deprives peoples . . . of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purpose and principles of the Charter." See also G.A. Res. 3281, *supra* note 27, at art. 16(1); Permanent Sovereignty over Natural Resources, GA Res. 3171, *supra* note 27. See also *Construction of a Wall* Separate Opinion of Judge Elaraby, *supra* note 6, ¶ 3.1 (expressing his approval of Falk and Weston's conclusion that "[i]n effect, the illegality of the Israeli occupation regime itself set off an escalatory spiral of resistance and repression, and under these conditions all considerations of morality and reason establish a right of resistance inherent in the population. This right of resistance is an implicit legal corollary of the fundamental legal rights associated with the primacy of sovereign identity."). Falk & Weston, *supra* note 25, at 146-47. On the different readings of these documents, see the positions of Cassese and Benvenisti, *supra* text accompanying notes 23-30.

82. Protocol I, *supra* note 27 (emphasis added).

83. MICHAEL BOTHE ET AL., NEW RULES FOR VICTIMS OF ARMED CONFLICTS 51, 52 (1982).

84. Theodor Meron, *The Time Has Come for the United States to Ratify Geneva Protocol I*, 88 AM. J. INT'L L. 678, 683 (1994).

85. Christopher Greenwood, *Customary Law Status of the 1977 Geneva Protocols*, in HUMANITARIAN LAW OF ARMED CONFLICT: CHALLENGES AHEAD 93 (Astrid J.M. Delissen & Gerard J. Tanja eds., 1991); Georges Abi-Saab, *The 1977 Additional Protocols and General International Law: Some Preliminary Reflections*, in Delissen & Tanja, *supra* at 115, 119; THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 62-70 (1989).

86. See Protocol I, *supra* note 27, at art. 51(5)(6) (considering an attack which "may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated," as a prohibited indiscriminate attack).

national recognition of the need to apply occupation laws to situations outside traditional belligerent occupation has taken root in contemporary international law.

(d) *Application of the Law of Occupation to the OPT*

Israel has long maintained that the Fourth Geneva Convention is not applicable to the occupied territories.<sup>87</sup> This contention relies on the second paragraph of Article 2 of the Fourth Geneva Convention, according to which, since the territories did not form part of the territory of a High Contracting Party upon their occupation, the Convention does not apply.<sup>88</sup> Israel based this argument on Jordan's annexation of the West Bank in 1950, which was recognized by only Britain and Pakistan.<sup>89</sup> Israel also based this argument on the fact that Egypt never claimed the Gaza Strip as part of its territory.<sup>90</sup>

Israel's position exemplifies the inadequacy of the traditional definition of occupation. The narrow definition allows exploitation by states attempting to refrain from providing minimal protection to occupied civilian populations. The Israeli position is also quite telling because it has been so widely rejected, even within Israel itself.<sup>91</sup>

The first legal response to the Israeli position is formalistic. First, there is no evidence that the term "territory of a High Contracting Party," as used in Common Article 2, refers solely to full legal title. Rather, it pertains to a *de facto* title of territory.<sup>92</sup> The rationale underlying this argument is that the Convention's drafters did not intend to provide occupants with discretion to ascertain the validity of title the ousted power had with respect to the territory.<sup>93</sup> Second,

87. It is interesting to note that the Security Provisions Order issued by the Israeli military commander on the day the IDF took over the West Bank contained a reference to the Fourth Geneva Convention as well as a determination that, in legal proceedings in established military tribunals, the Convention will have precedence over the Order. This Order, however, was revoked soon thereafter. See DAVID KRETZMER, *THE OCCUPATION OF JUSTICE* 32, 33 (2002).

88. Meir Shamgar, *Legal Concepts and Problems of the Israeli Military Government—The Initial Stage*, in *MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967-1980* 13, 33-34 (Meir Shamgar ed., 1982) [hereinafter Shamgar, *Legal Concepts*].

89. Yehuda Z. Blum, *The Missing Reversioner: Reflections on the Status of Judea and Samaria*, 3 *ISR. L. REV.* 279 (1968).

90. Meir Shamgar, *The Observance of International Law in the Administered Territories*, 1 *ISR. Y.B. HUM. RTS.* 262, 263 (1971) [hereinafter Shamgar, *Observance*]; Stacy Howlett, *Palestinian Private Property Rights in Israel and the Occupied Territories*, 34 *VAND. J. TRANSNAT'L L.* 117, 153 (2001). Both Jordan and Egypt are parties to the Fourth Geneva Convention.

91. See, e.g., Yoram Dinstein, *The International Law of Belligerent Occupation and Human Rights*, 8 *ISR. Y.B. HUM. RTS.* 104, 107 (1978); ESTHER R. COHEN, *HUMAN RIGHTS IN THE ISRAELI-OCCUPIED TERRITORIES 1967-1982*, 51-56 (1985). For a concise summary of the arguments and counter-arguments, see Orna Ben-Naftali & Keren R. Michaeli, 'We Must Not Make a Scarecrow of the Law': *A Legal Analysis of the Israeli Policy of Targeted Killings*, 36 *CORNELL INT'L L. J.* 233, 260-61 (2003) [hereinafter Ben-Naftali & Michaeli, *Targeted Killings*]; Benham Dayanim, *The Israeli Supreme Court and the Deportation of Palestinians: The Interaction of Law and Legitimacy*, 30 *STAN. J. INT'L L.* 115, 143-150 (1994); KRETZMER, *supra* note 87, at 31-35.

92. W. THOMAS MALLISON & SALLY V. MALLISON, *THE PALESTINIAN PROBLEM IN INTERNATIONAL LAW AND WORLD ORDER* 254 (1986).

93. *Id.* at 255. Indeed, the disputed status does not prevent the applicability of the laws of

the first paragraph of Article 2 is the relevant paragraph to apply when an occupation begins during a war, as in the present case.<sup>94</sup> This is supported by the ICRC's Commentary on Common Article 2 of the Convention.<sup>95</sup>

A second line of reasoning is based on the Palestinian right to self-determination. Accordingly, sovereignty lies in the people, not in a government. The Israeli position is thus untenable because it ignores the possibility that the Palestinian people constitute the lawful *reversioner* of the territories.<sup>96</sup> A related argument assumes that title cannot exist in a vacuum. Whether or not the 1948 Jordanian occupation and subsequent annexation were legal, Palestinians ultimately allowed the annexation, combining their sovereignty with that of Jordan's, resulting in the territories being taken from a High Contracting Party.<sup>97</sup>

Lastly, the third line of reasoning is teleological and focuses on the rights of the occupied population: the rationale underlying the Fourth Geneva Convention is to ensure protection of the civilian population from a foreign occupying power. Indeed, for all intent and purposes, Israel is a foreign occupying power of the Palestinian population. The Convention is part of international humanitarian law, the main purpose of which is protection of local populations regardless of whether a legitimate sovereign state exists.<sup>98</sup> Therefore, there is no justification for denying a local population the protections afforded by the Fourth Geneva Convention.<sup>99</sup>

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occupation. Throughout the 20th century, territorial disputes have often preceded or accompanied military occupations: the long standing dispute between Argentina and England over the Falkland Islands; Indonesia's invasion into east Timor; the Moroccan intervention in western Sahara. So was the South African occupation of Namibia.

94. Roberts, *Prolonged Military Occupation*, *supra* note 33, at 64; BENVENISTI, *LAW OF OCCUPATION*, *supra* note 34, at 109-10; COHEN, *supra* note 91, at 53.

95. PICTET, *supra* note 68, at 20-22.

96. Ardi Imseis, *On the Fourth Geneva Convention and the Occupied Palestinian Territory*, 44 HARV. INT'L. L. J. 65, 97 (2003).

97. Joseph H. H. Weiler, *Israel, the Territories and International Law: When Doves are Hawks*, in ISRAEL AMONG THE NATIONS 381, 386-87 (Alfred E. Kellermann et al. eds., 1998).

98. It is interesting to note in this context that pursuant to the Israeli High Court of Justice's (HCJ) ruling of April 18, 2002, H.C.J. 769/02, *The Public Committee Against Torture v. Government of Israel* (the legality of targeted killings case), which requested the parties, inter alia, to state their positions on what system of law applies to the issue, the Respondent's brief (Supplementary Statement by the State's Attorney's Office) argued not only that International Human Rights Law is inapplicable, but that the Respondent will use the term "Law of Armed Conflicts" rather than "International Humanitarian Law": "Without going into a profound discussion on the logic inherent in the new term ('international humanitarian law'), it is important to emphasize that one of its disadvantages, in the Respondent's way of thought, is the risk of confusing this term, which includes the 'laws of war' and the term 'international human rights law', which is another area altogether and separate from international law, which deals with the protection of the fundamental rights of individuals within state." H.C.J. 769/02, *The Public Committee Against Torture v. Government of Israel*, Supplementary Statement by the State's Attorney's Office of 2 Feb. 2003, Para. 40 (unofficial translation) (on file with authors). On the co-application of humanitarian and human rights law in occupied territories, see Orna Ben-Naftali and Yuval Shany, *Living in Denial: The Application of Human Rights in the Occupied Territories*, 37 ISR. L. REV., 17 (2003-04) [hereinafter *Living in Denial*].

99. Gasser, *supra* note 63, at 244; GEOFFREY R. WATSON, *THE OSLO ACCORD: INTERNATIONAL LAW AND THE ISRAELI-PALESTINIAN PEACE AGREEMENTS* 138 (2000). For a discussion on the effect Israel's occupation has had on the Palestinian population, see *infra* section

The international community widely embraced the concept of a Palestinian right to self-determination, as evidenced in the resolutions of the General Assembly<sup>100</sup> and the Security Council.<sup>101</sup> Accordingly, the international community demanded that Israel apply the Fourth Geneva Convention to the OPT. Israel declared that it would apply the “humanitarian provisions” of the Convention to the Palestinian territories,<sup>102</sup> a declaration relied upon by the Israeli High Court of Justice (HCJ) in petitions pertaining to various measures undertaken by Israel in the OPT.<sup>103</sup>

Finally, the ICJ had the opportunity to rule on this issue in its recent *Construction of a Wall* Advisory Opinion. In it, the ICJ endorsed the first and third reasoning.<sup>104</sup> Having first opined that, as of 1967, “all these territories (includ-

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II.A.3. The position that the Fourth Geneva Convention should be interpreted based on the substance of the relations, given that its purpose is to protect individuals, was taken by the International Criminal Tribunal for the Former Republic of Yugoslavia in the Tadic judgment. Prosecutor v. Tadic (Case IT-94-I-A) (1999) ¶ 168, at <http://www.un.org/icty/tadic/appeal/judgement/tad-aj990715e.pdf>. For a discussion of this judgment as representing the transformations in humanitarian law from being state centered to being individuals-centered, see Eyal Benvenisti, THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION, preface (2004) [hereinafter *Preface*]. See also, Partial Award, Central Front, Ethiopia Claim No. 2, April 28, 2004, ¶¶ 28-29, at <http://www.pca-cpa.org/ENGLISH/RPC/EECC/ET%20Partial%20Award.pdf>, where the Eritrea-Ethiopia Claims Commission rejected the link between the disputed status of certain territories and the protection of individuals present in these territories. The protections of international humanitarian law, held the Commission, “should not be cast into doubt because the belligerents dispute the status of the territory.” *Id.* The Commission rejected the idea that only territory to which title is clear can be occupied territory. *Id.*

100. See, e.g., G.A. Res. 32/91, U.N. GAOR, 32d Sess., 101st plen. mtg. at 69, U.N. Doc. A/RES/32/91 (1977); G.A. Res. 33/113, U.N. GAOR, 33rd Sess., 87th plen. mtg. at 70, U.N. Doc. A/RES/33/113 (1978); G.A. Res. 44/48, U.N. GAOR, 44th Sess., 78th plen. mtg. U.N. Doc. A/RES/44/48 (1989).

101. See, e.g., S.C. Res. 237, U.N. SCOR, 1361st mtg. at 5 (1967); S.C. Res. 446, U.N. SCOR, 2134th mtg. at 4 (1979); S.C. Res. 605, U.N. SCOR, 2777th mtg. at 4 (1987); see also Roberts, *Prolonged Military Occupation*, *supra* note 33, at 69-70.

102. Shamgar, *Observance*, *supra* note 90, at 266.

103. See, e.g., H.C. 2977/02, Adallah v. Commander of the IDF in the West Bank, 56(3) P.D. 6; H.C. 3451/02, Almadani v. Minister of Defense, 56(3) P.D. 30, 35-36; H.C. 4363/02, Zindah v. Commander of the IDF Forces in the Gaza Strip Judgment of May 28, 2002 (unpublished); H.C. 7015/02, Ajuri v. Commander of the IDF in the Judea and Samaria, 56(6) P.D. 352; H.C. 2056/04, The Village Council of Beit Surik et al. v. the Government of Israel and the Military Commander of the West Bank, 58(5) P.D. 807; H.C. 7957/04, Mara'abe v. The Prime Minister of Israel (unpublished), available at [www.court.gov.il](http://www.court.gov.il). Prior to the breakdown of the Oslo Accord, Israel had transferred most administrative functions in some of the territories to the Palestinian authority. This prompted it to declare that the transfer of control indicates that Israel was no longer an occupant. See WATSON, *supra* note 99, at 176. This position seems dubious, given both the relatively small percentage of the OPT that was transferred to the civilian administration of the Palestinian authority and the discontinuity of the territories. In effect, Israel continued to exercise effective control over the OPT. In any case, Israel's re-occupation of Gaza Strip and the West Bank during the second *Intifada* has rendered the argument irrelevant. The recent withdrawal from the Gaza Strip is likely to resurrect that argument with respect to this area. See *supra* note 1.

104. The Court stated that the “[t]he object of the second paragraph of Article 2 is not to restrict the scope of application of the Convention, as defined by the first paragraph . . . the drafters of the Fourth Geneva Convention sought to guarantee the protection of civilians in time of war regardless of the status of the occupied territories.” *Construction of a Wall*, *supra* note 6, ¶ 95.

ing East Jerusalem) remain occupied territories,”<sup>105</sup> it proceeded to conclude that:

[T]he Fourth Geneva Convention is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties. Israel and Jordan were parties to that Convention when the 1967 armed conflict broke out. The Court accordingly finds that the Convention is applicable in the Palestinian territories which before the conflict lay to the east of the Green line and which, during the conflict were occupied by Israel, there being no need for any further enquiry into the precise prior status of those territories.<sup>106</sup>

The ICJ discussion in this advisory opinion underscores the rationale for a wider definition of occupation to ensure that the law of occupation is applied to a broader range of situations.<sup>107</sup> This clearly lends significant legal weight to the compelling underlying logic in favor of applying the Geneva regime to the occupation in the OPT.

Having determined the relevance of the normative regime of occupation to the issue at hand, we can now proceed to discuss its essential foundations. “The foundation upon which the entire law of occupation is based,” writes Benvenisti, “is the principle of inalienability of sovereignty through the actual or threatened use of force. Effective control by foreign military force can never bring about by itself a valid transfer of sovereignty.”<sup>108</sup> The rule of non-recognition, forbidding states to recognize title thus acquired, is the normative consequence of this principle.<sup>109</sup> The following sub-section details this fundamental principle.

## 2. *Suspension of Sovereignty: Occupation Does Not Confer Title*

### *(a) Acquisition of Territory by Force is Impermissible Even If the Force is Used Legally*

This basic tenet of the law of occupation rests on and reflects the well-established general international legal principle that the acquisition of territory by force does not confer a valid title to that territory.<sup>110</sup> This principle holds even if force is used legally—for example in self-defense—and even if the status of the territory under consideration is disputed.<sup>111</sup> The rationale behind this

105. *Construction of a Wall*, *supra* note 6, ¶ 78. This conclusion follows a discussion pertaining to the status of the OPT, *id.* at ¶¶ 70-77, dating back to the Mandate. The Court notes specifically that various events subsequent to 1967 “have done nothing to alter this situation” (of occupation). *Id.* at ¶ 78.

106. *Id.* at ¶ 101. Before reaching its conclusion the Court discussed some of the arguments for and against the application of the Fourth Geneva Convention discussed above, placing a special emphasis on the subsequent interpretation of the Convention by the UN Security Council and General Assembly, the State Parties to the Convention, the Red-Cross and the Israeli Supreme Court. *Id.* at ¶¶ 90-100.

107. The question, whether all rules of occupation are relevant to all types of occupations in all circumstances, is interesting but as it is incidental to this paper, shall not be discussed here.

108. BENVENISTI, *LAW OF OCCUPATION*, *supra* note 34, at 5.

109. SURYA P. SHARMA, *TERRITORIAL ACQUISITION, DISPUTES AND INTERNATIONAL LAW* 148 (1997).

110. BENVENISTI, *LAW OF OCCUPATION*, *supra* note 34, at 5.

111. *See Partial Award, Central Front, Ethiopia Claim No. 2*, *supra* note 99.

principle is an obvious manifestation of two fundamental norms of the international legal order: the prohibition on the use of force and the right to self-determination.<sup>112</sup>

It is instructive to note in this context that the rule of non-recognition for the acquisition of title, as distinct from its prohibition, is not a novel idea. Rather, it was well established when the laws of occupation began to take form,<sup>113</sup> in an era preceding the prohibition on the use of force.

Thus, up until the late eighteenth century, international law recognized the right of conquest, "the right of the victor, in virtue of military victory or conquest, to sovereignty over the conquered territory and its inhabitants."<sup>114</sup> The occupant was considered the absolute owner of the occupied territory and therefore could dispose of it in any way it saw fit, including by annexation.<sup>115</sup> The premise upon which the laws of war were drafted, however, is that of the territorial integrity of states. All that was being sought by the laws of belligerent occupation was the maintenance of a status quo until a final resolution of the dispute was reached between the occupant and the ousted sovereign. It is for this reason that Article 43 of the Fourth Hague Conventions did not confer sovereign powers on the occupant, but rather limited its authority to maintain public order and civil life, while "respecting, unless absolutely prevented, the laws in force in the country."<sup>116</sup> This proviso precluded the annexation of the territory by the occupant.<sup>117</sup> This preclusion was further clarified in Article 47 of the Fourth Geneva Convention, which emphasized that annexation of an occupied territory during wartime, before the conclusion of any peace treaty, does not deprive protected persons of the rights guaranteed by the Convention.<sup>118</sup> Consequently, annexation does not alter the status of the territory or its population.<sup>119</sup> The latest affirmation of this principle is found in Article 4 of the Protocol, restating that neither occupation of a territory nor the application of the Protocol's provisions shall affect the legal status of the territory under dispute.<sup>120</sup>

The non-recognition rule, however, did not in itself render the acquisition

112. As discussed in the text accompanying *supra* notes 74-81, the right to self determination has supplanted, in this context, the right of states to sovereign equality and territorial integrity. See *Construction of a Wall*, *supra* note 6, ¶¶ 87-88.

113. See, e.g., L. Oppenheim, *The Legal Relations Between an Occupying Power and the Inhabitants*, 33 L. Q. Rev. 363, 364 (1917). Cf. Lieber Code, *supra* note 40, at art. 33 (implicitly authorizing annexation prior to the conclusion of a peace treaty).

114. SHARON KORMAN, *THE RIGHT OF CONQUEST; THE ACQUISITION OF TERRITORY BY FORCE IN INTERNATIONAL LAW AND PRACTICE* 9 (1996).

115. GRABER, *supra* note 41, at 13.

116. See *supra* notes 49-55 and accompanying text.

117. GEORG SCHWARZENBERGER, *INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 166-67 (3d ed. 1957).

118. See Fourth Geneva Convention, *supra* note 67, at art. 47.

119. PICTET, *supra* note 68, at 275-76. Pictet emphasizes the fact that the reference to annexation in the article cannot be considered as implying recognition of it as a means to acquire territory and that the contrary is true. *Id.*

120. COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JULY 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 73, 74 (Yves Sandoz et al. eds., 1987) [hereinafter COMMENTARY ON THE ADDITIONAL PROTOCOLS].

of territory completely illegal. Rather, acquisition has become illegal as a result of gradual renunciation by the international community of the use of force as an acceptable policy.<sup>121</sup> The principle, enshrined in Article 2(4) of the UN Charter, that "all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations,"<sup>122</sup> reflects one of the most basic principles of international law today.

The unacceptability of territorial acquisition through the use, or threat, of force is thus viewed as a corollary of the prohibition on the use of force.<sup>123</sup> The rationale behind this derives from the principle of *ex injuria jus non oritur*<sup>124</sup> and was succinctly articulated by Robert Jennings: "To brand as illegal the use of force against the 'territorial integrity' of a state, and yet at the same time to recognize a rape of another's territory by illegal force as being itself a root of legal title to the sovereignty over it, is surely to risk bringing the law into contempt."<sup>125</sup>

This formulation leaves open the possibility that a territory occupied through the use of legal force (that is, force not in violation of Article 2(4) of the UN Charter) may confer title.<sup>126</sup> However, a main feature of Article 2(4) is the elimination of any potential benefit emanating from the use of force, rendering it an unattractive policy to pursue, and consequently, the rejection of any type of force utilized as a means of achieving territorial change.<sup>127</sup> Furthermore, the argument that acquisition of territory by force used in self-defense pursuant to Article 51 of the UN Charter can confer legal title rests on the dangerous assumption that any extension of a legal use of force is legal.<sup>128</sup> This is inconsistent with the limits attached to the right of self-defense, namely, that the force used is proportionate to the threat of immediate danger. As a result, when the threat has diminished, it no longer sustains the right to self-defense. Therefore, the right to have recourse to self-defense does not include the right to permanently seize the territory of the attacked.<sup>129</sup> Indeed, Article 51 is an exception to the rule prohibiting the use of force and should be narrowly construed to limit the right to self-

121. For a detailed description of the evolution of the prohibition on the use of force, see YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENSE* 78, 79-98 (2001).

122. U.N. Charter, *supra* note 13, at art. 2(4).

123. See *Construction of a Wall*, *supra* note 6, ¶ 87. See also KORMAN, *supra* note 114, at 200-18.

124. Hersch Lauterpacht, *The Limits of the Operation of the Law of War*, 30 BRIT. Y.B. INT'L. L. 206, 233-37 (1953); Felice Morgenstern, *The Validity of the Acts of the Belligerent Occupant*, 28 BRIT. Y.B. INT'L. L. 291, 321 (1951).

125. ROBERT Y. JENNINGS, *THE ACQUISITION OF TERRITORY IN INTERNATIONAL LAW* 54 (1963).

126. See, e.g., SCHWARZENBERGER, *supra* note 117, at 297; Rudolf L. Bindschedler, *Annexation*, 3 Encyclopedia Pub. Int'l. L. 19 (1982); Rosalyn Higgins, *The June War: The United Nations and Legal Background*, 3 J. CONTEMP. HIS. 253, 270 (1968).

127. KORMAN, *supra* note 114, at 201.

128. JENNINGS, *supra* note 125, at 55.

129. *Id.* See also Derek W. Bowett, *International Law Relating to Occupied Territory: A Rejoinder*, 87 L. Q. REV. 473, 475 (1971).

defense only as a means to restore the status quo.<sup>130</sup>

Finally, the most convincing basis for the rejection of the argument that legitimizes the acquisition of territory through use of force in self-defense is the frequent inability to distinguish between the aggressor and the victim in a particular conflict. Wars, and memories of grievances, tend to rest on competing narratives that often defy aggressor/victim determinations. The Security Council, a political body entrusted with this determination,<sup>131</sup> is hardly a satisfactory arbitrator of history and of collective consciousness. Thus, differentiation with respect to the legality of title between one achieved through illegal use of force, and one achieved through a legal use of force rests on shaky ground, and ultimately undermines the coherence of the rule.<sup>132</sup>

The conclusion that no use of force can confer legal title finds support in the UN Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States. That document does not distinguish between legal and illegal uses of force when it states that “no territorial acquisition resulting from the threat or use of force shall be recognized as legal.”<sup>133</sup> Despite Israel’s adamant claim that the 1967 war was pursued in self-defense, the same rationale underlies the UN Security Council’s Middle East Resolution 242, which reiterated the inadmissibility of the acquisition of territory by war.<sup>134</sup>

In sum, the legality of occupation, or lack thereof, cannot be grounded in the determination that an occupation was occasioned as a result of self-defense. Thus, the debate about the legality of Israel’s original action in occupying the OPT during the 1967 war—a debate reflected in the different narratives which shape the conflict—is irrelevant to the question with which this paper is concerned.<sup>135</sup> Indeed, even if the Israeli narrative of a war fought in self-defense was accepted as the shared assumption of the conflict, it is irrelevant to both the determination of the legality of the continued occupation and to the principle of the inalienability of sovereignty.

Another important conclusion is that the Israeli annexation of East Jerusalem—expanding gradually its boundaries from 6.5 to 71 square kilometers—is

130. Brun-Otto Bryde, *Self-Defense*, 4 Encyclopedia Pub. Int’l. L. 212, 213-14 (1982); KORMAN, *supra* note 114, at 205. Korman indicates that the narrow ambit of Article 51 prohibits even the annexation of a territory of an aggressor that repeatedly uses the territory as a base for attacks and can therefore might still be considered proportionate. *Id.* at 204-05.

131. Article 39 of the United Nations Charter, *supra* note 13.

132. JENNINGS, *supra* note 125, at 55-56.

133. G.A. Res. 2625, *supra* note 81.

134. For the different views on the subject, see Amos Shapira, *The Six-Day War and the Right to Self Defence*, 6 ISR. L. REV. 65 (1971); Ibrahim F. I. Shihata, *Destination Embargo of Arab Oil: Its Legality Under International Law*, 68 AM. J. INT’L. L. 591, 598-601 (1974); Eugene V. Rostow, *The Illegality of the Arab Attack on Israel of October 6, 1973*, 96 AM. J. INT’L. L. 272, 274-82 (1975).

135. Criticizing the Secretary-General’s reference to the Israeli occupation as “illegal,” George Fletcher argued, *inter-alia*, that: “[F]ew seem to care anymore that the 1967 war was a war of self-defense for Israel.” Fletcher, *supra* note 4. Responding to this criticism, the spokesman for the Secretary-General noted that “[i]n using the word illegal . . . Secretary General Kofi Annan had no intention of entering the debate about the legality of Israel’s original action.” See *supra* note 5.



illegal.<sup>136</sup> This illegality was affirmed by both the Security Council and the General Assembly, with the consequence that under international law the area is still considered occupied.<sup>137</sup> The ICJ's *Construction of the Wall* Advisory Opinion confirms this conclusion.<sup>138</sup>

*(b) Occupation Does Not Confer Title In Light of the Principle of Self-Determination*

The principle of self-determination complements the principle that use of force cannot confer legal title to territory. Self-determination informs not only United Nations decisions regarding Israel's annexation of occupied East Jerusalem and its settlements in the OPT,<sup>139</sup> but also the Security Council's vision of "a region where two states, Israel and Palestine, live side by side within secure and recognized borders."<sup>140</sup> Underlying this determination is the rationale that if people, according to Common Article 1(1) of the International Covenants on Human Rights, have the right to "freely determine their political status,"<sup>141</sup> then sovereignty belongs to the people, and no valid title can be transferred in disregard of the will of the population of the territory.<sup>142</sup> This point was wholeheartedly approved by the *Construction of a Wall* Advisory Opinion regarding the *de facto* annexation of the vast Palestinian territories by way of settlement establishments and the construction of the Wall by Israel.<sup>143</sup>

An occupation, thus, suspends sovereignty insofar as it severs its ordinary link with effective control; but it does not, indeed it cannot, alter sovereignty. Effective control must be exercised in a manner that accords with the obligations of the occupying power as a trustee. The meaning of this form of trust is detailed

136. Israel extended its law to East Jerusalem on 26 June 1967. See The Law and Administration Ordinance (Amendment No. 11) Law, 21 L.S.I. 75 (1967); The Municipalities Ordinance (Amendment No. 6) Law, 21 L.S.I. 75 (1967). It formally annexed that area on 30 June 1980. See The Basic Law: Jerusalem, Capital of Israel, 34 L.S.I. 209 (1980).

137. See S.C. Res. 478, U.N. SCOR, 35th Sess., 2245th mtg. at 14, U.N. Doc. S/INF/36 (1980); G.A. Res. 35/169E, U.N. GAOR, 35th Sess., Supp. No. 48, at 208-2209, U.N. Doc. A/35/48 (1981); S.C. Res. 673, U.N. SCOR, 46th Sess., 2949 mtg. at Res. & Dec. 7, U.N. Doc. S/INF/46 (1991). Israel based its claim to sovereignty over East Jerusalem essentially on its right to fill the sovereignty vacuum which existed since the termination of the mandate, an argument which generated a debate among Israeli international lawyers and failed to gain the support of the international community. On the debate within Israel, see for example, Yehudah Blum, *The Redemption of Zion in International Law*, 3 ISR. L. REV. 279 (1968); Yoram Dinstein, *The Future Redemption of Zion in International Law*, 27 HAPRAKLIT 5 (1971). For a discussion on the legal status of Jerusalem, see John Quigley, *The Future of Jerusalem: A Symposium: Sovereignty in Jerusalem*, 45 CATH. U. L. REV. 765 (1996). Similar reactions followed Israel's annexation of the Golan Heights, a Syrian territory occupied by Israel during the Six-Day war of 1967. See Golan Heights Law, 36 L.S.I. 7 (5742-1981/2); S.C. Res. 497 (1981); G.A. Res. 36/226A (1981); G.A. Res. 39/146A (1984).

138. *Construction of a Wall*, *supra* note 6, ¶¶ 74-75, 120-22.

139. G.A. Res. 37/88C, U.N. GAOR, 37th Sess., Supp. No. 51, at 93, U.N. Doc. A/37/51 (1982-83); S.C. Res. 465, U.N. SCOR, 35th Sess., 2203d mtg. at 5, U.N. Doc. S/INF/36 (1980).

140. S.C. Res. 1397, U.N. SCOR, 4489th mtg., U.N. Doc. S/RES/1397 (2002).

141. See also G.A. Res. 1514 (XV), *supra* note 79.

142. Imseis, *supra* note 96, at 97; BENVENISTI, LAW OF OCCUPATION, *supra* note 34, at 183; KORMAN, *supra* note 114, at 228.

143. *Construction of a Wall*, *supra* note 6, ¶¶ 118-22. See *infra* section II.A.4.d.iii.

in the following sub-section.

### 3. *Trust Matters: Occupation As a Form of Trust*

#### (a) *The Framework of this Trust*

Implicit in the principle that occupation does not confer title and that the occupant is vested with the authority, in the words of Article 43 of the 1907 Fourth Hague Convention, "to take all the measures in his power to restore, and ensure, as far as possible, public order and safety/civil life, while respecting, unless absolutely prevented, the laws in force in the country," is the notion of trusteeship. Occupied territories "constitute . . . a sacred trust, which must be administered as a whole in the interests both of the inhabitants and the legitimate sovereign or the duly constituted successor in title."<sup>144</sup>

The framework of the trust consists of two features: the security needs of the occupying power on the one hand and the maintenance of civil life on the other hand. The trust thus carries with it a potential conflict of interests between those of the population and those of the occupant. In the nineteenth century's context, where governmental involvement in the life of the population was minimal, this framework produced two primary rules: the occupant bore the negative duty of refraining from infringing on the most basic rights of the inhabitants, while the latter possessed the duty of obedience to the occupant.<sup>145</sup>

With the continued evolution of the law of occupation, the scale began to tip to the side of the inhabitants. The Fourth Geneva Convention seems to reject the idea that the occupied population was under any international legal obligation to obey the occupant.<sup>146</sup> In parallel, the Convention considerably expands the protection of the inhabitants, setting obligations to respect their persons, honor, family life, religious convictions, and customs; to ensure humane treatment and freedom from discrimination; and, in particular, the protection of women.<sup>147</sup> The Convention also prohibits the infliction of physical suffering, corporal punishment, medical experiments, collective punishment, pillage, reprisals, the taking of hostages, deportations, and retroactive criminal legislation and

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144. *Construction of a Wall*, *supra* note 6, Separate Opinion of Judge Koroma, ¶ 2; Wilson, *supra* note 55, at 38.

145. The duty of obedience stemmed from three possible sources: municipal law (i.e., the population was to follow the laws of the land as they were the laws of the legitimate sovereign); international law (i.e., the duties incumbent upon the sovereign gave rise to corollary rights); and the physical ability of the occupant to enforce such obedience. *See generally* Oppenheim, *supra* note 113, at 365-69; Richard R. Baxter, *The Duty of Obedience to the Belligerent Occupant*, 27 BRIT. Y.B. INT'L L. 235 (1950) [hereinafter Baxter, *Obedience*].

146. For example, the terms "war rebellion" and "war treason" were not incorporated in the Convention. *See generally* Fourth Geneva Convention, *supra* note 67. Furthermore, while providing the occupant with the right to take measures against protected persons who carry out acts detrimental to the security of the occupant, it nevertheless preserves most of their rights under the Convention. *Compare id.* at arts. 27, 64 with *id.* at arts. 5, 68; *see also* Baxter, *Obedience*, *supra* note 145, at 261, 264.

147. Fourth Geneva Convention, *supra* note 67, at arts. 27, 75.

punishment. The right of the occupant to compel the inhabitants to work is restricted. The Convention further imposes positive duties on the occupant with regard to protecting children, ensuring food and medical supplies, maintaining hospitals, providing certain due process rights, and providing certain rights of imprisoned persons.<sup>148</sup> The Convention also restricts the right of the occupant to detain protected persons and stipulates substantial protection for detainees.<sup>149</sup>

The expanded protection of the inhabitants culminates with the currently prevailing view that international human rights law applies concurrently with international humanitarian law to occupied territories: the latter is the *lex specialis*, but the former applies either in cases of lacunae or for interpenetrative purposes.<sup>150</sup> Indeed, the longer the occupation, the heavier the weight to be accorded to the human rights of the occupied population.<sup>151</sup> The inseparability of human rights guarantees from the concept of trust rests at the heart of the ICJ advisory opinion concerning the *Legal Consequences of the Continued Presence of South Africa in Namibia*. The Court construed the relationship between South Africa and Namibia as a "sacred trust"<sup>152</sup> and found South Africa's continued infringement of the rights and well-being of the inhabitants of Namibia to de-

148. *Id.* at arts. 32, 33, 34, 49, 65, 67, 51, 52, 50, 55, 59-62, 56, 57, 66, 69, 71-73, 76, 77, respectively.

149. *Id.* at arts. 79-135.

150. See *Construction of a Wall*, *supra* note 6, ¶¶ 105-13; *Nuclear Weapons Advisory Opinion*, *supra* note 52, at 249. For similar views, see *Cyprus v. Turkey*, App. No. 8007/77, Eur. Comm'n H.R. Dec. & Rep. 85, 149-50 (1979); *Loizidou v. Turkey*, 310 Eur. Ct. H.R. (Ser. A) at 24 (1995); *Abella v. Argentina*, Case 11.137, Inter-Am. C.H.R., Report No. 55/97, OEA/Ser.L./V./II.95, doc. 7 rev. 271, ¶¶ 161, 166 (1997). Israel rejects this confluence of legal regimes, but its position has been widely rejected by both international bodies and scholars. For the Israeli stand, see STATE OF ISRAEL, IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS – SECOND PERIODIC REPORT, Aug. 3, 2001, ¶¶ 5-8, U.N. Doc. E/1990/6/Add.32 (2001); STATE OF ISRAEL, IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS – SECOND PERIODIC REPORT, Nov. 20, 2001, ¶ 8, U.N. Doc. CCPR/C/ISR/2001/2 (2001); STATE OF ISRAEL, IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS – ADDITIONAL INFORMATION, April 20, 2001, ¶¶ 2-5, U.N. Doc. E/1989/5/Add.14 (2001). This was also the position taken by the Israeli delegation before the International Committee on the Rights of the Child and the International Committee on the Elimination of Racial Discrimination. See Summary Record of the 829th meeting: Israel, Oct. 10, 2002, ¶¶ 39-42, U.N. Doc. CRC/C/SR.829 (2002); Note Verbale dated 8 August 1994 from the Permanent Representative of Israel to the United Nations Office at Geneva, U.N. Doc. CERD/C/282 (1995). For the position of relevant international bodies, see CONCLUDING OBSERVATIONS OF THE COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: ISRAEL, May 23, 2003, ¶ 15, U.N. Doc. E/C.12/1/Add.90 (2003); CONCLUDING OBSERVATIONS OF THE HUMAN RIGHTS COMMITTEE: ISRAEL, Aug. 5, 2003, ¶ 11, U.N. Doc. CCPR/CO/78/ISR (2003). For a legal analysis of the respective positions, as well as a summary and a critical review of the *Construction of a Wall* advisory opinion in this respect, see Ben-Naftali & Shany, *supra* note 98.

151. COHEN, *supra* note 91, at 29; Roberts, *supra* note 33, at 97.

152. Roberts, *supra* note 33, at 28-32. While the relationship between South Africa and Namibia represents a unique case (i.e., the mandate system established by the League of Nations), the reasoning of the Court nevertheless seems to apply generally given the Court's interpretation of the traditional concept of trust, found in the mandate system, in light of recent legal developments, namely, self-determination and independence of the people and basic human rights. Furthermore, the Court construed South Africa's presence in Namibia following the revocation of the mandate as an occupation.

stroy “the very object and purpose of that relationship.”<sup>153</sup> Therefore, the Court held the UN General Assembly’s termination of the mandate to be valid and the continuing presence of South Africa in Namibia—a presence which thereafter was a foreign occupation<sup>154</sup>—to be illegal.<sup>155</sup>

It is interesting to note in this context that the Court reiterated this position in its recent *Construction of a Wall* Advisory Opinion. In the part of the opinion dealing with the status of the OPT, the Court narrates the history of the conflict, the roots of which are described as follows: “Palestine was part of the Ottoman Empire. At the end of the First World War, a class “A” Mandate for Palestine was entrusted to Great Britain by the League of Nations.”<sup>156</sup> The Court recalled that, in its 1950 opinion on the *International Status of South West Africa*,<sup>157</sup> it held that “two principles were considered to be of paramount importance” with respect to territories that were placed under the Mandate system: “the principle of non-annexation and the principle that the well-being and development of . . . peoples [not yet able to govern themselves] form[ed] ‘a sacred trust of civilization.’”<sup>158</sup>

The Court returned to this point in a later part of the opinion concerned with determining the relevant international legal rules applicable to the issue at hand. Recalling its 1971 opinion on the *Continued Presence of South Africa in Namibia*, the Court stated that “current developments in international law in regard to non-self governing territories . . . made the principle of self-determination applicable to all [such territories] . . . . [T]hese developments leave little doubt that the ultimate objective of the sacred trust . . . was the self-determination of the people concerned.”<sup>159</sup> What the Court seemed to be doing, then, was to construct the concept of a “sacred trust,” the origins of which were rooted in the Mandate system, as the common denominator of all situations where people are not self-governing, occupation included. That construction is facilitated by the historical fact that Palestine was a Mandate territory, and that the roots of the Israeli-Palestinian conflict rested in the dissolution of the Mandate. This construction enabled the Court to emphasize not only the principle of self-determination, but also the related notion of a “sacred trust” as applicable to the OPT.<sup>160</sup>

The trust, especially one emanating from a belligerent type of occupation

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153. *Continued Presence of South Africa in Namibia* Advisory Opinion, *supra* note 21, at 47.

154. Roberts, *supra* note 33, at 293-94.

155. *Continued Presence of South Africa in Namibia* Advisory Opinion, *supra* note 21, at 54.

156. *Construction of a Wall*, *supra* note 6, ¶ 70.

157. *International Status of South-West Africa*, 1950 I.C.J. 128 (July 11).

158. *Id.* at 131; *Construction of a Wall*, *supra* note 6, ¶ 70.

159. *Continued Presence of South Africa in Namibia* Advisory Opinion, *supra* note 21, at 52-54; *Construction of a Wall*, *supra* note 6, ¶ 88.

160. Note that some of the judges who appended separate opinions took issue with this analogy. See *Construction of a Wall*, *supra* note 6, Separate Opinion of Judge Higgins, ¶ 2; Separate opinion of Judge Kooijmans, ¶ 33.

rather than from a mandate, does not abrogate the security interests of the occupying power.<sup>161</sup> The Convention explicitly provides exceptions to some of the guarantees afforded to the population, based on military necessity and conditions.<sup>162</sup> Furthermore, the occupant is allowed to take measures against protected persons in the form of promulgating penal laws<sup>163</sup> and assigning residence<sup>164</sup> and internment.<sup>165</sup> That being said, such authority seems to have fallen out of favor in recent years in light of pronouncements by the international community endorsing the right of an occupied population to rise against the occupant in its pursuit of self-determination.<sup>166</sup> Security measures are thus subject to careful scrutiny.

The balance between humanitarian and human rights concerns—pouring content into the notion of trust, on the one hand, and military necessity, delimiting but never substituting this trust on the other hand—is thus a hallmark of the current law of occupation. The working assumption behind this arrangement is that an occupation is of a relatively short duration.<sup>167</sup> The restriction on the occupant's authority to amend the laws of the country so as to make necessary reforms, which might be called for throughout the years, underscores this point. In long-term occupations, the result may well be the stagnation of all aspects of life: economic, political, cultural, and social existence, with harsh consequences for the population. It is, in fact, hard to reconcile such an outcome with the occupant's general duty to ensure civil life in the occupied territory.<sup>168</sup> Furthermore, the longer the occupation lasts, the higher the likelihood of an uprising by the population, acting in pursuit of its right to self-determination. This, in turn, is likely to generate stricter security measures by the occupant, to the detriment of the population. The net result would thus be less, rather than more, weight given to the humanitarian and human rights concerns of the population, especially in the event of an unsuccessful uprising. The trust then would be sacrificed at the

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161. It is interesting to note that Allan Gerson referred to the Israeli occupation as a "trustee occupation." He argues that this type of occupation occurs when the legal status of the territory prior to the occupation was short of full sovereignty, the occupation was not generated by a war of aggression, and the occupant was seeking to positively develop the area. The occupant should be seen as a trustee responsible for promoting the population's right of self-determination and should, therefore, not be constrained by the law requiring the preservation of the status quo. See Allan Gerson, *Trustee Occupant: The Legal Status of Israel's Presence in the West Bank*, 14 HARV. INT'L L. J. 1 (1973). This typology, however, is problematic from the perspective of law and fact alike. From a legal perspective, as discussed in the text above, the concept of trust underlies the law of occupation in general; from a factual perspective, it is unclear whether Israel's occupation stemmed from a war of self-defense, and even if it did, it is clear that it has not assumed the role of a trustee fostering the Palestinian right to self-determination, as acknowledged by Gerson himself already in 1978. See ALLAN GERSON, ISRAEL, THE WEST BANK AND INTERNATIONAL LAW 78-82 (1978).

162. See, e.g., Fourth Geneva Convention, *supra* note 67, at arts. 27, 49, 51, 53.

163. *Id.* at art. 64.

164. *Id.* at art. 78.

165. *Id.* at art. 42.

166. See *supra* section II.A.1.c.

167. See *infra* section II.A.4.a.

168. BENVENISTI, LAW OF OCCUPATION, *supra* note 34, at 147; Roberts, *supra* note 33, at 52; Goodman, *supra* note 49.

altar of the interests of the occupying power in maintaining its hold over the occupied territory. Such indeed is the sorry story of the Israeli occupation of the OPT.<sup>169</sup>

*(b) Application of the Framework to the OPT*

The story of the occupation is inseparable from the settlement enterprise. The latter generates both the dispossession of and the discrimination against the Palestinians and signifies Israel's breach of the trust contemplated by the normative regime of occupation. In order to substantiate this argument, the remaining part of this section discusses the genesis of the settlements and the debate concerning their legality. We then focus on various consequences of the settlements' construction and maintenance, including the confiscation of land, the existence of two separate legal systems in the area, operating along ethnic lines, and the effects of such actions on the daily life of the occupied population. While the Devil may well be in the details, for the purposes of this discussion, we are less concerned with specific violations of the law of occupation occasioned by any particular action—violations that have attracted attention elsewhere in the relevant literature—but, rather, with identifying the basic structure and nature of this occupation regime.

*(i) The Settlements*

Immediately following the 1967 war, the Labor government then in power initiated the settlement project based ostensibly on security considerations.<sup>170</sup> When the Likud Party formed a government in 1977, the security motive gave way to an ideological claim to the entire OPT, based on historical and religious grounds. The settlements enterprise thus became a "holy work" which Prime Minister Shamir, who took office after Begin in 1983, vowed to pursue.<sup>171</sup> That year, the Ministry of Agriculture and the World Zionist Organization, a quasi-governmental organization entrusted with furthering the political objectives of Zionism, jointly prepared a master plan for the development of the settlements designed "to achieve the incorporation (of the West Bank) into the (Israeli) national system."<sup>172</sup> A comparison between its details and current realities indicate a high degree of geographical, if not demographical, materialization.<sup>173</sup> This has been achieved by a dual Israeli policy of land expropriation from the

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169. *Construction of a Wall*, *supra* note 6, Separate Opinion of Judge Eleraby, ¶ 3.1. See also *supra* note 81.

170. See MERON BENVENISTI, *THE WEST BANK DATA PROJECT: A SURVEY OF ISRAEL'S POLICIES* 30-36 (1984); RAJA SHEHADEH, *OCCUPIER'S LAW: THE WEST BANK AND THE RULE OF LAW* 15-49 (1985) [hereinafter SHEHADEH, *OCCUPIER'S LAW*].

171. Cited in John Quigley, *Living in Legal Limbo*, 10 PACE INT'L. L.R. 1, 6 (1998).

172. *Id.* The first settlement plan prepared by the World Zionist Organization stated clearly that the objectives of the settlements were to fragment the Palestinian population and prevent it from forming "a territorial continuity and political unity." See KRETZMER, *supra* note 87, at 76.

173. BENVENISTI, *supra* note 170, at 19-28.

Palestinians and economic incentives to the settlers.<sup>174</sup> As a result of this policy, there are at present some 120 settlements in the West Bank with over 230,000 settlers. The much ado about the recent withdrawal from the Gaza Strip involved the dismantlement of a mere 16 settlements and the evacuation of less than 10,000 settlers. About 180,000 settlers live in the neighbourhoods of the expanded area of East Jerusalem.<sup>175</sup> The population growth in the settlements is three times that of Israel.<sup>176</sup>

The land upon which the settlements are built in the West Bank, in addition to adjacent confiscated land, settlement bypass roads, and other land controlled by the military, amount to 59% of the West Bank. The settlements and the bypass roads connecting them to each other as well as to Israel have divided the West Bank into some 60 non-contiguous zones. East Jerusalem is severed from the rest of the West Bank.<sup>177</sup>

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174. B'TSELEM, The Israeli Information Center for Human Rights in the Occupied Territories, LAND GRAB: ISRAEL'S SETTLEMENT POLICY IN THE WEST BANK, available at [http://www.btselem.org/english/Publications/Summaries/Land\\_Grab\\_2002.asp](http://www.btselem.org/english/Publications/Summaries/Land_Grab_2002.asp) [hereinafter LAND GRAB]. The settlers and other Israeli citizens working or investing in the settlements are entitled to significant financial benefits, such as generous loans for the purchase of apartments, part of which is converted to a grant, significant price reductions in leasing land, incentives for teachers, exemption from tuition fees in kindergartens, free transportation to school, grants for investors, infrastructure for industrial zones, incentives for social workers, and reductions in income tax for individuals and companies. The Ministry of the Interior provides increased grants for the local authorities in the territories relative to those provided for communities within Israel. In the year 2000, the average per capita grant in the Jewish local councils in the West Bank was approximately sixty-five percent higher than the average per capita grant in local councils inside Israel. The discrepancy in the grants for the regional councils is even greater: the average per capita grant in 2000 in the regional councils in the West Bank was 165 percent of that for a resident of a regional council inside Israel. *Id.*

175. See Foundation for Middle East Peace, Statistics, at [http://www.fmep.org/settlement\\_info/statistics.html](http://www.fmep.org/settlement_info/statistics.html); see also B'TSELEM, Settlements Population By Year, the West Bank, at [http://www.btselem.org/English/Settlements/Settlement\\_population.xls](http://www.btselem.org/English/Settlements/Settlement_population.xls). Prior to the recent withdrawal from the Gaza Strip, which totals 140 square miles, less than 10,000 Jews lived on 20% of the land, and 1.1 million Palestinians in the remaining area. See Foundation for Middle East Peace, ISRAELI SETTLEMENTS IN THE OCCUPIED TERRITORIES: A GUIDE - A SPECIAL REPORT OF THE FOUNDATION FOR MIDDLE EAST PEACE, available at [http://www.fmep.org/reports/special\\_reports/no11-march2002/index.html](http://www.fmep.org/reports/special_reports/no11-march2002/index.html). In tandem with the pull-out from Gaza, Israel dismantled 4 settlements in Northern Samaria in the West Bank, where some 580 settlers lived. Some of these settlers relocated to Israel while others relocated to other settlements in the West Bank. The area was not handed over to the Palestinians.

176. See QUESTION OF THE VIOLATION OF HUMAN RIGHTS IN THE OCCUPIED ARAB TERRITORIES, INCLUDING PALESTINE, Report of the Special Rapporteur of the Commission on Human Rights, John Dugard, on the Situation of Human Rights in the Palestinian Territories Occupied by Israel since 1967. Res. 1993/2 A, 14, U.N. Doc. E/CN.4/2004/6, Sep. 8, 2003 [hereinafter 2003 REPORT ON THE SITUATION OF HUMAN RIGHTS IN THE PALESTINIAN TERRITORIES].

177. See QUESTION OF THE VIOLATION OF HUMAN RIGHTS IN THE OCCUPIED ARAB TERRITORIES, INCLUDING PALESTINE, Update to the Mission Report on Israel's Violations of Human Rights in the Palestinian Territories Occupied Since 1967, Submitted by Giorgio Giacomelli, Special Rapporteur, to the Commission on Human Rights at its Fifth Special Session. U.N. Doc. E/CN.4/2001/30, Mar. 21, 2001 at ¶ 26. For a discussion of the politics of the geography and planning of the settlements, see Rafi Segal and Eyal Weizman, *The Mountain Principle of Building in Heights*, in A CIVILIAN OCCUPATION: THE POLITICS OF ISRAELI AGRICULTURE 79 (Rafi Segal and Eyal Weizman eds., 2003).

*(ii) Dispossession: Violations of the Law of Occupation  
Generated as a Result of the Settlements*

The legal debate concerning the Israeli settlements has focused primarily on Article 49 paragraph 6 of the Fourth Geneva Convention, which prohibits the occupant from transferring parts of its own civilian population into the territory it occupies.<sup>178</sup> The Israeli government has always maintained that the prohibition does not include voluntary transfer by citizens to occupied territories because it was informed by, and should be interpreted in light of, the policies practiced by Germany during WWII, to which the Israeli policy cannot be compared.<sup>179</sup> This position is not entirely consistent with the ICRC commentary on the Fourth Convention, according to which the intent of this provision was to maintain a general demographic status quo in occupied territories.<sup>180</sup> Further pronouncements by the Parties to the Convention rejected the Israeli interpretation by declaring the settlements as a breach of Article 49 paragraph 6.<sup>181</sup> This situation prompted the adoption of a different version of this prohibition in Article 8(2)(b)(viii) of the Rome Statute, which criminalizes such transfers whether they are undertaken directly or indirectly.<sup>182</sup> This provision might well render Israel's incentive policy as an "indirect transfer," and largely explains Israel's decision not to ratify the Statute.<sup>183</sup> Further, given that the Israeli government built the settlements and provided financial incentives to settlers, the correct conclusion seems to be that the settlement project is a "direct transfer" and thus falls within the scope of the original prohibition of Article 49 paragraph 6.<sup>184</sup>

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178. Such transfer further constitutes a grave breach of Protocol I. See Protocol I, *supra* note 27, at art. 85(4)(a). As already noted, Israel is not a party to the Protocol. See *supra* note 82-84 and accompanying text.

179. For the Israeli position, see Israeli Settlements and International Law, at <http://www.mfa.gov.il/mfa/go.asp?MFAH0jyz0>; Ayelet Levy, *Israel Rejects Its Own Offspring: The International Criminal Court*, 22 Loy. L.A. Int'l & Comp. L. Rev. 207, 230-31 (1999); Jean-Marie Henckaerts, *Deportation and Transfer of Civilians in Time of War*, 26 Vand. J. Transnat'l L. 469, 472 (1993).

180. PICTET, *supra* note 68, at 283.

181. See DECLARATION OF THE CONFERENCE OF THE PARTIES TO THE FOURTH GENEVA CONVENTION, Dec. 5, 2001, available at <http://www.eda.admin.ch/eda/e/home/foreign/hupol/4gc/docum2.Par.0006.UpFile.pdf/mg0112054gcdeclame.pdf>; GERHARD VON GLAHN, LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 675-76 (7th ed. 1996).

182. Rome Statute of the International Criminal Court, art. 8(2)(b)(viii), July 17, 1998, U.N. Doc. A/CONF. 183/9; 37 I.L.M. 1002 (1998); 2187 U.N.T.S. 90.

183. See Statement by Israeli Foreign Ministry Legal Advisor, Allen Baker, Jan. 3, 2001, available at [http://www.mfa.gov.il/MFA/MFAArchive/2000\\_2009/2001/1/International+Criminal+Court+-+Press+Briefing+by+I.htm](http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2001/1/International+Criminal+Court+-+Press+Briefing+by+I.htm). Israel signed the Statute on Dec. 31, 2001, attaching a declaration conveying its disappointment in the "politicization" of the Statute by the insertion of "formulations tailored to meet the political agenda of certain states." *Id.* On Aug. 28, 2002, Israel informed the U.N. Secretary-General of its intention not to ratify the Statute. For the status of ratifications of the Rome Statute, including declarations made by Israel, see <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp#N3>.

184. See Catriona Drew, *Self-determination, Population Transfer and the Middle East Peace Accords*, in HUMAN RIGHTS, SELF-DETERMINATION AND POLITICAL CHANGE IN THE OCCUPIED PALESTINIAN TERRITORIES 119, 144-46 (Stephen Bowen ed., 1997). A recent official report presented to the Prime Minister's Office by an attorney especially hired for this purpose (Ta-



The ICJ had an opportunity to opine on this matter in its advisory opinion on the *Construction of a Wall*, as the “wall’s sinuous route has been traced in such a way as to include within that area the great majority of the Israeli settlements in the occupied Palestinian Territory (including East Jerusalem).”<sup>185</sup> Noting that “since 1977, Israel has conducted a policy and developed practices involving the establishment of settlements in the Occupied Palestinian Territory, contrary to the terms of Article 49 paragraph 6,” the Court concluded that “the Israeli settlements in the Occupied Palestinian Territory (including east Jerusalem) have been established in breach of international law.”<sup>186</sup>

Israel’s extensive confiscation of Palestinian land, carried out to satisfy the needs of the continuing expansion of the settlements,<sup>187</sup> might also amount to a grave breach of Article 147. Article 147 prohibits “extensive appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.”<sup>188</sup> Such action is criminalized by Article 8(2)(a)(iv) of the Rome Statute.

The method and effect of this expropriation merit attention. Following a determination by the Israeli High Court of Justice (HCJ) that private land could not be confiscated for the establishment of civilian settlements,<sup>189</sup> the Israeli government moved quickly to define ever greater portions of the occupied territories as “state land.” The lack of a comprehensive land ownership registration in the OPT, which made it quite difficult for individuals to prove their land ownership, as well as a governmental decision to designate all uncultivated rural land as “state land,” facilitated the expansion of the definition of “state land.”<sup>190</sup> The effect of these practices has been two-fold: first, the *de facto* dispossession of individual Palestinians; second, the dispossession of the Palestinian population of land reserves that should have primarily served its interests. Instead, these lands are administered by the Israel Land Administration, a body set up under Israeli Law to administer state land in Israel proper, and now being used for set-

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Ilya Sasson) observed that there are at least 105 unauthorized “outposts,” some of them construed on private Palestinian land, and there is evidence that governmental authorities were involved in the establishment of many of those. The clear implication is that the rest of the settlements were indeed “authorized.” See *Opinion on Unauthorized Outposts, Prime Minister’s Office Communication Department* (March 2005), available at <http://www.pmo.gov.il/NR/rdonlyres/0A0FBE3C-C741-46A6-8CB5-F6CDC042465D/0/sason2.pdf>.

185. *Construction of a Wall*, *supra* note 6, ¶ 119.

186. *Id.* at ¶ 120. The Court reached this conclusion based inter alia on U.N. Security Council Resolution 446, *supra* note 101.

187. Such expropriation has continued during and after the Oslo process. For a discussion on the expropriation methods, see generally RAJA SHEHADEH, FROM OCCUPATION TO INTERIM ACCORDS: ISRAEL AND THE PALESTINIAN TERRITORIES 4-35 (1997); Imseis, *supra* note 96, at 102.

188. The *Construction of a Wall* Advisory Opinion does not cite Article 147 of the Fourth Geneva Convention as relevant to the case at hand. This is due to the Court’s interpretation of Article 6 as precluding the applicability of all but 43 of the Convention’s 159 articles, including Article 147. We take issue with this interpretation, as is discussed at *infra* section II.A.4.b.

189. H.C. 390/79, Dewikat v. Government of Israel, 34(1) P.D.1; see also KRETZMER, *supra* note 87, at 85-89.

190. For a detailed account of these practices and the complex set of legal mechanisms that enable them, see LAND GRAB, *supra* note 174; SHEHADEH, OCCUPIER’S LAW, *supra* note 170, at 22-41; KRETZMER, *supra* note 87, at 89-94.

tlements.<sup>191</sup>

Israel has also used control over planning to restrict the growth of Palestinian towns and villages while expanding the settlements.<sup>192</sup> This control has been exercised by omission—that is, by refraining from “preparing updated regional outline plans for the West Bank. As a result, until the transfer of authority to the Palestinian Authority (and, to this day, in area ‘C’), two regional plans prepared in the 1940’s by the British Mandate continue to apply.”<sup>193</sup> Subsequent “special partial outline plans” for some four hundred villages, far from alleviating the problem of inadequate planning schemes, underscored its rationale as they constituted demarcation plans which prohibited construction outside existing lines. This administrative and legal structure has then been used both to justify the rejection of Palestinians’ applications for building permits on private land, and to issue demolition orders for houses that were constructed without a permit.<sup>194</sup> Thus, the law that vested the occupant with the power to ensure the welfare of the occupied population has been used by the former to advance its own interests to the detriment of the latter.

Indeed, while different phenomena are associated with the settlements—such as unequal allocation of water resources coupled with acute water shortage in the Palestinians villages<sup>195</sup> and acts of violence committed by settlers against the Palestinian population which receive no proper response from the Israeli security forces<sup>196</sup>—it is the legal terrain wrought by the occupation which is of

191. KRETZMER, *supra* note 87, at 95.

192. Israel transferred the planning authority from the Jordanian Ministry of the Interior to the Commander of the IDF Forces in the region. Following the Oslo Accords, Israel retained this authority over area C, comprising some 60% of the West Bank territory and some 600,000 Palestinians. See generally LAND GRAB, *supra* note 174.

193. *Id.*

194. *Id.*; Amnesty International, Demolition and Dispossession: The Destruction of Palestinian Homes, MDE 15/059/1999 (Dec. 1999), at <http://web.amnesty.org/library/index/ENGMD150591999?open&of=ENG-ISR>.

195. The average Palestinian in the West Bank residing in communities connected to a water network consumes sixty liters of water per day. The consumption of water by people not thus connected, while unknown, is certainly lower. The average consumption per capita in Israel as well as in the settlements is almost six times higher, that is, 350 liters a day. In practical terms this discrepancy means that settlements enjoy an unlimited supply of running water which allows for swimming pools and green lawns, while their neighboring Palestinians often lack drinking and bathing water. See YEHEZKEL LEIN, NOT EVEN A DROP: THE WATER CRISIS IN PALESTINIAN VILLAGES WITHOUT A WATER NETWORK (2001); Yehezkel Lein, *Thirsty for a Solution: The Water Crisis in the Occupied Territories and Its Resolution in the Final Status Agreement* (2002), at <http://www.btselem.org/Download/engwater.doc>; Yehezkel Lein, *Disputed Waters: Israel's Responsibility for the Water Shortage in the Occupied Territories* (1998), at [http://www.btselem.org/Download/Disputed\\_Waters\\_Eng.doc](http://www.btselem.org/Download/Disputed_Waters_Eng.doc).

196. See S.C. Res. 471, 5 June 1980, U.N. SCOR 35th Sess., 2226th mtg., U.N. Doc. S/RES/36 (1980); S.C. Res. 904, 18 March 1994, U.N. SCOR 49th Sess., 3351th mtg., U.N. Doc. S/RES/50 (1994) (calling on Israel to assume its obligation to protect the civilian population and to take measures, including the confiscation of arms, to prevent illegal acts of violence by Israeli settlers). According to B'TSELEM, Israeli civilians killed 145 Palestinians in the OPT: among them, 25 children. Other activities against the Palestinian inhabitants include setting up roadblocks to disrupt normal Palestinian life, shooting at roof-top water heaters, burning cars, smashing windows, destroying crops and uprooting trees, and harassing merchants and owners of stalls in the market. See

special relevance to our analysis. There are separate legal systems operating concurrently in the West Bank, effectively dividing the population along ethnic lines. Jewish settlers are extra-territorially subject to Israeli civilian law, whereas the Palestinians are subject to the Israeli military law and to local law.<sup>197</sup> Two methods are used to generate this situation: first, the application of Israeli law *in personam* to Israeli citizens and Jews in the OPT; second, the partial application of Israeli law, on a supposedly territorial basis, to the Jewish settlements in the OPT. Each of these arrangements merits our brief attention.

The personal application of Israeli law works in a myriad of ways. For example, Emergency Regulations issued by the Israeli government, and renewed regularly through legislation,<sup>198</sup> determine that Israeli courts will have jurisdiction over criminal offences committed by Israeli citizens (and, in general, by people who are present in Israel) in the OPT, even if the offence took part in areas under the control of the Palestinian Authority.<sup>199</sup> Further, the law extending the Emergency Regulations determines that, for certain statutes, people who live in the OPT will be considered residents of Israel if they are Israeli citizens *or* are "entitled to immigrate to Israel under the Law of Return" (i.e., Jews and family members of Jews).<sup>200</sup> These statutes, seventeen in total, include the Income Tax Ordinance, the Social Security Law of 1968, and the National Health Care Law of 1994.<sup>201</sup> The net result is a different set of rights and duties applying to different groups in the OPT along ethnic lines. Finally, in this context, we should note the extension, on a personal basis, of Israel's Election Law, which determines that Israelis who reside in territories held by the Israeli Defense Forces

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B'TSELEM, VIOLENCE OF SETTLERS AGAINST PALESTINIANS, available at [http://www.btselem.org/english/Settlers\\_Violence/Settlers\\_Violence.asp](http://www.btselem.org/english/Settlers_Violence/Settlers_Violence.asp); Ron Dudai, *Free Rein: Vigilant Settlers and Israel's Non-Enforcement of the Law* (2001), at [http://www.btselem.org/Download/Free\\_Rein\\_Eng.doc](http://www.btselem.org/Download/Free_Rein_Eng.doc); Yhezkel Lein, *The Performance of Law Enforcement Authorities in Responding to Settler Attacks on Olive Harvesters*, at [http://www.btselem.org/Download/2002\\_Olive\\_Harvest\\_Eng.doc](http://www.btselem.org/Download/2002_Olive_Harvest_Eng.doc). This violence is particularly prevalent in Hebron, a city where 180,000 Palestinians live, and where a population of approximately 450 Jewish settlers is effectively allowed to humiliate, threaten, and exercise violence against Palestinian property and people. See Shlomo Swissa, *Hebron, Area H2: Settlements Cause Mass Departure of Palestinians*, at [http://www.btselem.org/Download/2003\\_Hebron\\_Eng.doc](http://www.btselem.org/Download/2003_Hebron_Eng.doc); Breaking the Silence: Soldiers Speak Out about their Service in Hebron (5 Nov. 2004), available at [http://www.breakingthesilence.org.il/what\\_we\\_did\\_en.asp](http://www.breakingthesilence.org.il/what_we_did_en.asp). In May 2005, the HCJ rejected a petition by Palestinian residents of Hebron asking for the enforcement of criminal law against the Jewish settlers of Hebron. See H.C.J. 454/03, Halabi v. Prime Minister, available at <http://www.court.gov.il>.

197. Imseis, *supra* note 96, at 106.

198. Law for the Extension of Emergency Regulations (Judea, Samaria and the Gaza Strip—Judging for Offences and Legal Aid) 1971.

199. Other regulations allow Israeli courts in civil suits to engage with matters relating to residents of the OPT. Civil Procedure Regulations (Issuing of Documents to the Occupied Territories) 1969.

200. The Law of Return of 1950 gives, in Article 1, the right to immigrate to Israel to Jews (defined in Article 4B as a person who is the offspring of a Jewish mother, or converted to Judaism, and is not a member of another religion); and also to children, grandchildren, and spouses of Jews; and to spouses of children and grandchildren of Jews, unless they were born Jews and willingly converted to another religion (Article 4A). Law of Return, 1950, 4 L.S.I. 114 (1950).

201. This law does not apply in areas under the control of the Palestinian Authority, a fact that has no practical effect as Israelis and Jews do not reside in these areas.

(IDF) will be able to vote in their place of residence.<sup>202</sup> This provision is significant, especially considering Israel's lack of absentee ballot voting.<sup>203</sup> Its effect is to allow Israeli settlers in the OPT to take part in choosing the government which rules these territories as an occupying power, whereas the Palestinian residents of the very same territories, who are also subject to the actions of this very same government, do not partake in choosing it.<sup>204</sup>

Whereas the personal application of Israeli law to Israelis—and in some cases, to non-Israeli Jews—in the OPT is effected through Emergency Regulations issued by the Israeli government and extended by the Israeli legislature, territorial application occurs through Orders issued by the Israeli Military Commander in the territories.<sup>205</sup> These Orders give special status to Jewish settlements in the OPT by applying certain aspects of Israeli law in various spheres, such as education, to those territorial units, giving them the privileges enjoyed by localities within Israel. The same mechanism further prohibits Palestinians from entry into the settlements unless they possess a special permit. Israelis are exempt from the need for a special permit to enter the settlements. Israelis are defined for this purpose as (1) residents of Israel; (2) residents of the territories who are Israeli citizens, or who are allowed to immigrate to Israel under the Law of Return; or, (3) people who are not residents of the territories, but who have a valid visa to Israel. This definition extends the privilege of entering the settlements beyond Israeli citizens and Jews to tourists who are neither Israeli nor Jewish.<sup>206</sup> Given this last qualification, the supposedly territorial application of these laws may also be seen as personal. The net result is the creation of two separate legal regimes, including rules restricting freedom of movement, based on a combination of ethnic and territorial factors.

It should finally be noted that in a recent decision concerning the rights of Israeli settlers evacuated from the Gaza strip, the HCJ decided that the Israeli Basic Laws (which comprise the nascent constitution of Israel), including the Basic Law: Human Liberty and Dignity, apply *in personam* to Israelis in the occupied territories. In the same decision, the Court left open the question of the application of these laws to non-Israeli residents (i.e. the Palestinians) of the same territories.<sup>207</sup>

202. Election Law (Consolidated Version) 1969, at art. 147.

203. Israeli law does not allow Israeli citizens, with the exception of diplomats and similar official groups of people, to vote outside the geographic boundaries of Israel. *See id.* at art. 6.

204. For an analysis of the Israeli legislation applying Israeli law on a personal basis to Israelis in the territories, see Amnon Rubinstein, *The Changing Status of the "Territories" (West Bank and Gaza): From Escrow to Legal Mongrel*, 8 TEL AVIV UNIVERSITY STUDIES IN LAW 59, 68-72 (1988). For a discussion of the significance of the difference in suffrage, see Oren Yiftachel, 'Ethnocracy': *The Politics of Judaizing Israel/Palestine*, 6 Constellations 364, 377 (1999).

205. Order Regarding Management of Regional Councils (No. 783) and Order Regarding Management of Local Council (No. 892), in LAND GRAB, *supra* note 174.

206. Order Concerning Security Instructions (Judea and Samaria) (No. 378) 1970—Announcement on a Closed Area (Israeli settlements), in LAND GRAB, *supra* note 174. For a discussion of the military legislation applying Israeli law on the settlements on a territorial basis, see Rubinstein, *supra* note 204, at 72-79.

207. H.C.J. 1661/05, Regional Council Gaza Beach v. The Knesset, at ¶¶ 78-80 (unpub-

The partial application of Israeli law to the OPT, observed leading Israeli constitutional law scholar Amnon Rubinstein in his 1988 article *The Changing Status of the "Territories" (West Bank and Gaza): From Escrow to Legal Mongrel*, blurred the boundaries between Israel and the territories.<sup>208</sup> This partial application also propelled the drastic change in the status of the territories from "escrow" to "legal mongrel." Once perceived as an "'escrow' under the rules of international law—that is as a trust—they have gradually been incorporated in practice into the realm of Israel's rule."<sup>209</sup> The substitution of the "legal mongrel" for the "escrow" clearly signifies the breach of trust by the occupier and, *prima facie*, appears to have generated the veiled annexation of the territories. Given that the violation of trust and the veiled annexation violate the two basic tenets of the normative regime of occupation, it would be more appropriate to conclude that the transition effected was from an "escrow" to an "illegal" mongrel. Indeed, a "legal mongrel," at least in this context, seems to be an oxymoron: the "mongrel" is illegal.

Furthermore, closer scrutiny reveals that, from a legal perspective, the Israeli government's actions actually constitute a greater violation of international law than that which would have been created by a straight-forward annexation, as they confer the benefits of annexation to the occupier without requiring it to incorporate the people under occupation to its polity, with its ensuing rights and privileges. When combined with the different treatment and rights accorded to settlers,<sup>210</sup> often at the expense of the Palestinians, the occupation appears to resemble a form of colonial regime—the hallmark of which is the exploitation of the resources of the territory for the benefits of the home country and its citizens—rather than a belligerent occupation.<sup>211</sup> Indeed, it may well amount to prohibited discrimination as defined by Article 1 of the Convention on the Elimination of All Forms of Racial Discrimination<sup>212</sup> and under the Interna-

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lished), available at [www.court.gov.il](http://www.court.gov.il). The question of the applicability of the Basic Law to the rights of Palestinians was also left open by the HCJ in an earlier decision that dealt with the detention conditions of Palestinians in the OPT. H.C.J. 3278/02, *The Center for the Defense of the Individual v. Commander of the IDF Forces in the West Bank*, 57(1) PD 385.

208. Rubinstein, *supra* note 204, at 59.

209. *Id.* at 67.

210. The different treatment is evident in numerous situations, primarily in relation to land, water, planning, protection from violence and the rule of law. Note that the HCJ recently acknowledged that "the Israeli settlements (in Judea and Samaria) received special benefits, and the State invested in their construction and expansion many resources, a treatment that was not accorded to the local population." See H.C.J. 548/04, *Amna v. IDF Commander in Judea and Samaria* (Feb 26, 2004) (unpublished) (on file with authors).

211. KRETZMER, *supra* note 87, at 75, 197. Kretzmer notes the significance, in this context, of Israel's invocation of the law of occupation in order to thus justify the limitations on the rights of the Palestinians. For a discussion of this position, see Yaffa Zilbershatz, *The Control of the IDF in the Judea, Samaria and Gaza: Belligerent Occupation or Colonial Take-Over*, 20 BAR-ILAN STUD. 547 (2004).

212. International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter CERD]. Article 1 defines the term "racial discrimination" as "any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the

tional Convention on the Suppression and Punishment of the Crime of Apartheid.<sup>213</sup> In its extreme form, that is, if practiced as a widespread or systematic policy, apartheid is criminalized in Article 7(1)(j) of the Rome Statute as a crime against humanity.<sup>214</sup>

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recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life." *Id.* at art. 1. It is interesting to mention in this context that in the *Construction of a Wall* Advisory Opinion, *supra* note 6, the Court noted that the construction of the Wall was accompanied by the creation of a new administrative regime and that under this regime, the part of the West Bank lying between the Green Line and the Wall had been designated as a "Closed Area": "Residents of this area may no longer remain in it, nor may non residents enter it, unless holding a permit or identity card issued by the Israeli authorities . . . . Israeli citizens, Israeli permanent residents and those eligible to immigrate to Israel in accordance with the Law of Return may remain in, or move freely to, from and within the Closed Area without a permit." *Construction of a Wall Advisory Opinion*, *supra* note 6, ¶ 85. The Court returned to this point in the application part of the Opinion, when it determined that "that construction, the establishment of a closed area . . . and the creation of enclaves have moreover imposed substantial restrictions on the freedom of movement of the inhabitants of the Occupied Palestinian Territory (with the exception of Israeli citizens and those assimilated thereto)." *Id.* at ¶ 133. These references to a regime which operates on the basis of ethnic distinctions seem to suggest the *prima facie* relevance of the CERD, and it is therefore surprising that the Court failed to refer to it when it enumerated the human right treaties to which Israel is a party and which are, at least potentially, applicable to the issue at hand. See Ben-Naftali & Shany, *Living in Denial*, *supra* note 98.

213. Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 243. Article II(a)(3) defines Apartheid, *inter alia*, as "[A]ny legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognized trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association." *Id.* at art. II(a)(3). Article II(a)(4) also incorporates into the definition "[A]ny measures, including legislative measures, designed to divide the population along racial lines by the creation of separate reserves and ghettos for the members of a racial group or group . . . the expropriation of landed property belonging to a racial group or groups or to members thereof." See also Samira Shah, *On the Road to Apartheid: The Bypass Road Network in the West Bank*, 29 COLUM. HUM. RTS. L. REV. 221, 283 (1997). While there are many differences between the former regime of Apartheid in South Africa and the occupation regime of the OPT, it is interesting to note here that a prevailing discourse regarding the Israeli-Palestinian peace process in Israel is one of "separation." The question arises whether this "separation" may not resemble the separation entailed in the regime of "apartheid." This discussion brings up complex questions about the possible solutions to the Israeli-Palestinian conflict and the viability of the "separation" thesis that does not amount to apartheid. The problem of resemblance to apartheid, thus, did not go away but to some extent extenuated during the years of the Oslo process. See Aeyal M. Gross, *The Constitution, Reconciliation, and Transitional Justice: Lessons from South Africa and Israel*, 40 STAN. J. INT'L. L. 47 (2004). In this sense, it is interesting to compare the peace processes in Israel/Palestine and in South-Africa. Both processes probably continued traditional approaches toward the solution of these conflicts: incorporation in South Africa and partition in the Israeli-Palestinian context. The question for the Israeli-Palestinian situation is how to create partition that does not entail apartheid. For a perspective on why these two conflicts took such different turns despite their similar roots, see generally RAN GREENSTEIN, *GENEALOGIES OF CONFLICT: CLASS, IDENTITY AND STATE IN PALESTINE/ISRAEL AND SOUTH AFRICA* (1995).

214. Article 7(2)(h) defines the crime of apartheid as "inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime." *Supra* note 182. For a discussion of the customary status of the crime of apartheid, see ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW*

For the purposes of the argument advanced in this section, however, it is not necessary to determine whether or not the occupation of the OPT has become a form of colonialism or resembles an apartheid regime. Rather, it is sufficient to conclude that, inasmuch as the legal structure of the occupation regime is *designed* to—and in fact *does*—serve the interests of the settlers at the expense of the interests of the occupied population, it breaches the obligations of the occupant under Article 43 of the 1907 Fourth Hague Convention, thus violating the basic tenet of trust inherent in the law of occupation.<sup>215</sup> Inasmuch as the justness of an occupation is determined, as recently suggested by Michael Walzer in the context of the American occupation of Iraq, by its political direction and the distribution of benefits it provides,<sup>216</sup> the occupation of the OPT appears to be neither legal nor just.

*(iii) Disrupting the Fabric of Life of the Occupied Population*

The unjustness of the political geography created by the above-described complex legal system of the occupation is most poignant in its effect on the daily life of the occupied population, particularly as it severely restricts Palestinian freedom of movement. An intricate network of some 300 checkpoints and roadblocks divides the OPT internally into a patchwork of cantons. Permits are required to travel from one canton to the other; Gaza is completely isolated from the rest of the Palestinian territory.<sup>217</sup> These multitudinous divisions and barriers constitute an enormous constraint on the ability of Palestinians to get to work, schools, hospitals, friends, and family.<sup>218</sup> Assessing this situation, the Special Rapporteur of the Human Rights Commission concluded that “settlements are linked to each other and to Israel by a vast system of bypass roads that have a 50- to 75-meter buffer zone on each side in which no building is permitted. These settlements and roads, which separate Palestinian communities and deprive Palestinians of agricultural land, have fragmented both land and people. In effect, they foreclose the possibility of a Palestinian State as they destroy the

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25 (2003), suggesting that while apartheid constitutes a state delinquency under customary international law, it does not yet entail individual criminal responsibility under that law. For an extensive discussion of the illegality of apartheid, see also Separate Opinion of Vice President Ammoun in *Continued Presence of South Africa in Namibia* Advisory Opinion, *supra* note 21, at 77-88.

215. It is worthwhile to note here that the Israeli Supreme Court contributed to the undermining of Article 43 when it allowed large scale changes in local law and included the settlers as part of the local population for the purposes of Article 43. See KRETZMER, *supra* note 87, at 187.

216. See MICHAEL WALZER, *ARGUING ABOUT WAR*, 162-65 (2004). Walzer posits that the political direction of the occupation is to steadily “empower the locals,” and the benefits are to be “widely distributed,” for the occupation to be just. Such empowerment may necessitate changes in local law, especially in cases where the occupation purports to serve as a transitional regime from a dictatorial to a democratic form of government. Such changes, while ostensibly conflicting with the language of various provisions of the law of occupation, may nevertheless be permissible if they promote its overall purposes in a manner that advances, rather than violates, its basic tenets. See Benvenisti, *Preface*, *supra* note 99.

217. 2003 REPORT ON THE SITUATION OF HUMAN RIGHTS IN THE PALESTINIAN TERRITORIES, *supra* note 176, at 9-10.

218. *Id.* at 9.

territorial integrity of the Palestinian Territory.”<sup>219</sup>

Further measures affecting movement and, indeed, any resemblance of a normal life are closures that prohibit Palestinian movement without special permits and curfews that compel inhabitants to stay in their homes.<sup>220</sup> Curfews and closures constitute the primary cause for Palestinian economic losses.<sup>221</sup> The cumulative effect of checkpoints and curfews is a sharp decline in access to health care,<sup>222</sup> in health standards generally (due to shortages of food, clean water, access to hospitals), and rising rates of unemployment and poverty.<sup>223</sup>

It is clear that these, and other measures,<sup>224</sup> not only violate fundamental

219. 2002 REPORT ON THE VIOLATIONS OF HUMAN RIGHTS IN THE OCCUPIED ARAB TERRITORIES, *supra* note 31, at 8. See also Drew, *supra* note 184, at 146-54 (providing a detailed argument on the ways the settlements violate the Palestinian right to self determination).

220. B'TSELEM, FREEDOM OF MOVEMENT, available at [http://www.btselem.org/english/Freedom\\_of\\_Movement/index.asp](http://www.btselem.org/english/Freedom_of_Movement/index.asp); 2003 REPORT ON THE SITUATION OF HUMAN RIGHTS IN THE PALESTINIAN TERRITORIES, *supra* note 176, at 9 (noting the slight decrease in the number of Palestinians thus affected by curfews from approximately 520,000 in 2002 to 390,000 in 2003).

221. THE WORLD BANK (WEST BANK AND GAZA OFFICE, JERUSALEM), TWENTY-SEVEN MONTHS – INTIFADA, CLOSURES, AND PALESTINIAN ECONOMIC CRISIS: AN ASSESSMENT, ch. 2, ¶ 2.5. (May, 2003) [hereinafter WORLD BANK REPORT].

222. See Combined Report of B'TSELEM and PHYSICIANS FOR HUMAN RIGHTS-ISRAEL, HARM TO MEDICAL PERSONNEL (Dec. 2003), available at [http://www.phr.org.il/Phr/Pages/PhrArticles\\_index.asp?Cat=13](http://www.phr.org.il/Phr/Pages/PhrArticles_index.asp?Cat=13).

223. 2003 REPORT ON THE SITUATION OF HUMAN RIGHTS IN THE PALESTINIAN TERRITORIES, *supra* note 176, at 10.

224. Such other measures include, for example, targeted killings. Out of 2,305 Palestinians killed by Israel's security forces during the *Al-Aqsa* Intifada, 181 were specifically targeted by Israel and 111 bystanders were killed in the course of these operations. B'TSELEM, FATALITIES IN THE AL-AQSA INTIFADA: 29 SEPTEMBER 2000-20 APRIL 2005, available at <http://www.btselem.org/English/Statistics/Casualties.asp>. 377 Israeli citizens were killed by Palestinians within Israel and another 198 were killed in the OPT. See generally AMNESTY INTERNATIONAL, ISRAEL AND THE OCCUPIED TERRITORIES: STATE ASSASSINATIONS AND OTHER UNLAWFUL KILLINGS 9 (2001), available at <http://web.amnesty.org/library/Index/engMDE150052001>. For a comprehensive analysis of the legality of the policy, see Ben-Naftali & Michaeli, *Targeted Killings*, *supra* note 91. The execution of the policy has been suspended since the Feb. 2005 cease-fire agreement. Another measure of dubious legality is administrative detention. In the beginning of March 2003, Israel held more than one thousand Palestinians in administrative detention, i.e. detention without charge or trial, authorized by administrative order rather than by judicial decree. See B'TSELEM, ADMINISTRATIVE DETENTION, available at [http://www.btselem.org/english/Administrative\\_Detention/index.asp](http://www.btselem.org/english/Administrative_Detention/index.asp). Throughout the years, this measure was exercised against Palestinian voicing their opposition against the Israeli occupation and as a substitute for criminal trials in cases where the evidence could not substantiate criminal charges. See AMNESTY INTERNATIONAL, ISRAEL AND THE OCCUPIED TERRITORIES: DESPAIR, UNCERTAINTY AND LACK OF DUE PROCESS (1997), available at <http://web.amnesty.org/library/index/engmde150031997>; B'TSELEM, ADMINISTRATIVE DETENTION IN THE OCCUPIED TERRITORIES, available at [http://www.btselem.org/english/Administrative\\_Detention/Occupied\\_Territories.asp](http://www.btselem.org/english/Administrative_Detention/Occupied_Territories.asp). Detainees are further deprived of due process rights. See Imseis, *supra* note 96, at 119-20. In addition to all the above, Israel has been carrying out, until recently, a policy of house demolition, destroying close to 1,000 houses since 1987. See B'TSELEM, HOUSE DEMOLITIONS-STATISTICS, available at <http://www.btselem.org/english/HouseDemolitions/Statistics.asp>. This means is justified by Israel as necessary to prevent the houses from becoming a haven for militants against the IDF and the settlement and as a punishment against those who committed crimes against Israel as well as for deterrence purposes. See 2003 REPORT ON THE SITUATION OF HUMAN RIGHTS IN THE PALESTINIAN



norms of both humanitarian and human rights law,<sup>225</sup> but render the very conduct of civil life in the OPT practically impossible. It is, indeed, “a human tragedy that is unfolding in Palestine.”<sup>226</sup> The construction of the Wall signifies the culmination of these policies, their devastating effect on life in the territories, and the violation of the very notion of trust which underlies an occupying power’s responsibilities *vis-à-vis* the occupied population. The ICJ’s reading of this situation is quite pertinent:

the route chosen for the wall gives expression *in loco* to the illegal measures taken by Israel with regard to Jerusalem and the settlements, as deplored by the Security Council . . . . There is also a risk of further alterations to the demographic composition of the Occupied Palestinian Territory . . . . inasmuch as it is contributing . . . to the departure of Palestinian population from certain areas . . . . That construction, along with the measures taken previously, thus severely impedes the exercise by the Palestinian people of its right to self-determination.<sup>227</sup>

(iv) *The (Im)balance of Security*

The destruction of the fabric of life of the Palestinian residents of the OPT is evident. It is equally clear, however, that an occupying power, while required to maintain civil life in the territories under its effective control, is not required to forsake its own security interests. Indeed, Israel contends that the Palestinians, having responded to Israel’s offer to end the conflict with the *al-Aqsa intifada* comprising indiscriminate terrorist attacks—attacks constituting crimes against humanity<sup>228</sup>—against Israeli citizens, are to be held responsible for their situation.<sup>229</sup> Israel argues further that “many of the Palestinian terrorist groups per-

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TERRITORIES, *supra* note 176, at 13-14. As far as this means is exercised for deterrence purposes and for the punishment of families of suicide bombers, it might amount to prohibited reprisals and collective punishment and extensive property damage unwarranted by military necessity by Articles 33 and 53 of the Fourth Geneva Convention, respectively. See Fourth Geneva Convention, *supra* note 67, at arts. 33, 53.

225. *The Construction of a Wall* Advisory Opinion, *supra* note 6, ¶¶ 123-37. The Court held that the consequences for the occupied population amount to breaches of their rights to privacy and freedom of movement, as guaranteed by Articles 17 and 12 respectively of the ICCPR, *supra* note 78; the right of access to holy places enshrined in G.A. Resolution 181 (II), the Armistice Agreement as well as the subsequent peace treaty between Israel and Jordan; the rights to work, to an adequate standard of living, to health and to education under Articles 6, 7, 11, 12, 13 respectively of the ICESCR, *supra* note 78, as well as Articles 16, 24, 27 and 28 of the Convention on the Rights of the Child. G.A. Res. 44/25, annex 44, U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989).

226. See Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine, Report of the Special Rapporteur of the Commission of Human Rights on the Situation of Human Rights in the Palestinian Territories Occupied By Israel Since 1967, Addendum: Note by the Secretary-General (A/57/366/Add.1), ¶ 2 (Sep. 16, 2003).

227. *Construction of a Wall*, *supra* note 6, ¶ 122.

228. See AMNESTY INTERNATIONAL, WITHOUT DISTINCTION—ATTACKS ON CIVILIANS BY PALESTINIAN ARMED GROUPS (July, 2002), available at <http://www.amnesty.org>.

229. See, e.g., Israel’s Response to the Report Submitted by the Special Rapporteur on the Right to Food, submitted to the Commission on Human Rights, 60th Sess., E/CN.4/2004/G/14, ¶¶ 5, 6 (Nov. 26, 2003) (indicating the Rapporteur’s failure to take account of the Palestinians’ responsibility for the encouragement of terror attacks against Israel, which form the basis of Israel’s actions taken in self defense).

perpetrate their atrocities not to put an end to Israel's presence, but rather to frustrate any political progress that may do just that."<sup>230</sup>

Israel's thesis thus rests on an attempt to sever the nexus between the occupation and the *intifada* and, indeed, between its obligations as an occupying power and its right and duty to protect its own citizens and security. In doing so, it challenges, *inter alia*, the observation of the Special Rapporteur of the United Nations Commission of Human Rights that "violations of human rights are a necessary consequence of military occupation."<sup>231</sup> As was noted above, Israel regards this observation as "an attempt to rewrite international law" and as a "remarkable legal thesis" which "contravenes the entire body of humanitarian law dealing with belligerent occupation, which establishes standards to be maintained by States that find themselves in a situation of occupying territory."<sup>232</sup>

Israel is right in maintaining that the international law of occupation establishes such standards and that, therefore, an occupation does not *ipso facto* entail a violation of either human rights or its own governing regime; such a construction would have rendered the normative regime which governs the situation not only redundant, but illegal *ab initio*. It does not follow, however, that the violations of human rights and of humanitarian law in the OPT are not a necessary consequence of this specific occupation; that is, that they are generated by Israel's breach of the basic tenets of the law of occupation rather than by the mere fact of occupation.

This breach is evident in the following position taken by Israel and approved by the HCJ. According to this position, the security concerns of the occupying power (within Article 43 of the Hague Regulations)—against which the rights of the Palestinians should be balanced—include protection of the lives and safety of Israeli settlers, and therefore, of the settlements themselves. Thus, the balancing act between the security needs of the occupying power on the one hand, and the maintenance of civil life on the other hand, is imbalanced in a way detrimental to the rights of the Palestinian population, when the added burden of protecting the illegal settlements is used as a security concern to justify the impairment of the Palestinian rights.<sup>233</sup>

230. Note From Israel to the U.N., *supra* note 32, at sec. 2.

231. 2002 REPORT ON THE VIOLATIONS OF HUMAN RIGHTS IN THE OCCUPIED ARAB TERRITORIES, *supra* note 31, at 4.

232. Note From Israel to the U.N., *supra* note 32, at sec. 3.

233. See H.C.J. 10356/02, Hess v. Commander of the IDF Forces in the West Bank, 58 (3) P.D. 443; H.C.J. 7957/04 *Mara'abe case*, *supra* note 103. In the first of these cases, the rationale stated in the text was accepted by the HCJ as a basis for authorizing the Israeli army to seize land owned by Palestinians and destroy structures in Hebron for the purpose of allowing the settlers safe access to the Cave of the Patriarchs. In the latter case, the Court determined that the military commander is authorized to construct the separation barrier in the occupied area for the purpose of defending the lives and safety of the Israeli settlers. While the HCJ held that the injury to the rights of the Palestinians in the specific segment of the barrier before it in this case was disproportionate, its principled position illustrates how the settlements and their incorporation into the military commander's security considerations in a way that upsets the balancing act as envisaged in international law, are part of the breach of trust discussed in this section. See Aeyal Gross, *The Construction of a Wall Between the Hague and Jerusalem: The Enforcement and Limits of Humanitarian Law and the*

In order to assess the issue of the (im)balance of security and to evaluate the respective positions articulated above, it is necessary to inquire into the last tenet of the normative regime: its temporal dimension. The following subsection undertakes this inquiry.

#### 4. *Right on Time: An Occupation Is Temporary*

##### (a) *The Normative Provisions Indicating the Temporary Nature of Occupation*

The two basic principles discussed above—the inalienability of sovereignty vested in the people and its management as a form of trust—generate the third principle of occupation: its temporality. Indeed, the very essence of occupation is founded on this idea. Thus, writes Graber:

The modern law of belligerent occupation is anchored in the concept that occupation differs in its nature and legal consequences from conquest. It is therefore not surprising that the early definitions of the modern concept of occupation are chiefly concerned with the main aspects of this difference, namely the *temporary nature* of belligerent occupation as contrasted with the permanency of conquest, and the *limited, rather than the full powers* which belligerent occupation entails for the occupant.<sup>234</sup>

It is in this light that one should understand the various provisions in the documents detailing the law of occupation that have, *ab initio*, imposed constraints on the managerial powers of the occupant, evidencing the temporary nature of its control. The Lieber Code already provided, in Article 3, that martial law imposed by the occupant only *suspends* criminal and civil law as well as domestic administration and government during the period of occupation.<sup>235</sup> Article 32 of that Code spoke of suspension or termination of certain individual relationships, but emphasized that only a peace treaty may settle such changes.<sup>236</sup> In the same vein, Article 2 of the Brussels Declaration defined the ousted authority as *suspended*; Article 3 complemented this characterization by stating that “with this object he shall maintain the laws which were in force in the country in time of peace, and shall not modify, suspend or replace them unless necessary.”<sup>237</sup>

Article 43 of the 1899 and 1907 Hague Conventions corresponded to Articles 2 and 3 of the Brussels Declaration by imposing a duty on the occupant to respect, unless “absolutely prevented,” the laws in force in the country.<sup>238</sup> Although not expressly defining the authority of the former sovereign as “suspended,” the Hague Convention neither altered the temporary concept of occupation nor its underlying rationale that the occupant does not acquire sovereignty, but merely exercises a temporary right of administration until the

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*Structure of Occupation* (forthcoming).

234. GRABER, *supra* note 41, at 37 (emphasis added).

235. Lieber Code, *supra* note 40.

236. *Id.* at art. 31.

237. Brussels Declaration, *supra* note 15.

238. 1907 Hague Convention of 1907, *supra* note 51, at art. 43.

status of the territory is finally determined.<sup>239</sup> Indeed, Article 43 prevents the occupant from creating laws, an unquestionable attribute of sovereignty,<sup>240</sup> which are not absolutely necessary for the specific temporary context of occupation, such as for the maintenance of order, the safety of the occupier's forces, and the realization of the legitimate purpose of the occupation.<sup>241</sup> The enactment of laws and regulations that have no reasonable relation to the purposes of occupation are illegitimate.<sup>242</sup> This understanding of the provisional, non-sovereign status of the occupant is reaffirmed by Article 55 of the 1907 Fourth Hague Convention, stating that the occupant is merely to administer and safeguard public buildings, real estate, and the agricultural estates belonging to the state.<sup>243</sup>

This idea of occupation as a temporary form of control underlies the provisions of the Fourth Geneva Convention.<sup>244</sup> Due, however, to the shift in emphasis of the Convention from the rights of the ousted sovereign to the welfare of the occupied population,<sup>245</sup> the temporal restrictions on the occupying authority are more implicit than explicit when compared to earlier codes. Thus, for instance, the non-recognition of annexation stipulated in Article 47 of the Fourth Convention is informed by, but does not explicitly state, the temporary nature of occupation.<sup>246</sup> This may also be said with regard to paragraph 6 of Article 49, which prohibits the settlement of the occupant's nationals in the occupied territory. In addition to the WWII experience with the mass transportation of population, which informed Article 49 paragraph 6, the provision was also designed to ensure that the sociological and demographic structure of the territory be left unchanged.<sup>247</sup>

Further indication of the temporary nature of occupation and its limitation to the preservation of the status quo is found in Article 54 of the Convention, which stipulates that the status of judges and public officials in the territory shall

239. Everett P. Wheeler, *Government de facto*, 5 AM. J. INT'L. L. 66, 70 (1911); Oppenheim, *supra* note 113, at 437; GRABER, *supra* note 41, at 68-69; VON GLAHN, OCCUPATION, *supra* note 64, at 31.

240. Gasser, *supra* note 63, at 254.

241. Arnold D. McNair, *Municipal Effects of Belligerent Occupation*, 57 L. Q. REV. 33, 35 (1941). According to Benvenisti, the drafters of Article 43 viewed military necessity as the sole ground preventing the occupant from maintaining the old order. BENVENISTI, LAW OF OCCUPATION, *supra* note 33, at 14. This has changed over the course of the twentieth century and scholars began to ponder other legitimate grounds for legislation as the safeguarding of the welfare of the occupied population. VON GLAHN, OCCUPATION, *supra* note 64, at 97.

242. THE JUDGE ADVOCATE GENERAL SCHOOL, LAW OF BELLIGERENT OCCUPATION: TEXT NO. 11, 35-37 (1944).

243. Gasser, *supra* note 63, at 246.

244. Fourth Geneva Convention, *supra* note 67.

245. See *supra* notes 67-83 and accompanying text.

246. PICTET, *supra* note 68, at 274; BENVENISTI, LAW OF OCCUPATION, *supra* note 34, at 99.

247. Gasser, *supra* note 63, at 246; PICTET, *supra* note 68, at 283. This prohibition could also be understood as designed to prevent a situation wherein citizens of the occupying power reside in the occupied area and are subject to a different legal regime. See discussion accompanying notes 195-214.

not be altered.<sup>248</sup> This proscription reaffirms the maintenance of the country's judicial and administrative structure, which is expected to go on functioning without hindrance,<sup>249</sup> and enhances the conclusion that the occupant authority is temporal and non-sovereign.

Article 64 contains a similar provision with respect to the laws in place. Its first paragraph states that "the penal law of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the occupying power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention." The second paragraph of the article, however, is more telling:

The Occupying Power may, however, subject the population of the occupied territory to provisions that are essential to enable the Occupying Power to fulfill its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying force or administration, and likewise of the establishments and lines of communication used by them.<sup>250</sup>

Unlike the first paragraph that speaks of only "penal law," the second paragraph refers to "provisions." In light of the drafting history of the Article and the issues dealt with in the Convention, this provision applies to all types of laws.<sup>251</sup> Indeed, the Convention's Commentary suggests that Article 64 "expresses, in a more precise and detailed form, the terms of Article 43 of the Hague regulations, which lays down that the Occupying Power is to respect the laws in force in the country 'unless absolutely prevented.'"<sup>252</sup> The reason for the more permissive language of Article 64 lies, according to Benvenisti, in the need to provide the occupant with the proscriptive means to fulfill its obligation under the Convention, the extent of which reaches far beyond that stipulated in earlier codes.<sup>253</sup> This, indeed, expresses the growing concern for the welfare of the occupied population that characterizes the Geneva Convention.<sup>254</sup>

### (b) Article 6 of the Fourth Geneva Convention

Article 6 of the Fourth Geneva Convention relates most directly to the temporal limits of occupation and thus merits special attention. It provides in paragraph 3:

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248. Fourth Geneva Convention, *supra* note 67, at art. 54.

249. Gasser, *supra* note 63, at 257.

250. Fourth Geneva Convention, *supra* note 67, at art. 64.

251. BENVENISTI, LAW OF OCCUPATION, *supra* note 34, at 101-02.

252. PICTET, *supra* note 68, at 335.

253. BENVENISTI, LAW OF OCCUPATION, *supra* note 34, at 104.

254. Benvenisti has recently argued that "Article 64 retains little of Hague's Article 43's strong bias against modifying local law," as the occupant under the Geneva Convention "is no longer the disinterested watch guard, but instead a very involved regulator and provider," granted with "wide legislative powers under Article 64." This change in the role of the occupant, says Benvenisti, is due to the focus of the Geneva regime on the population under occupation. See Benvenisti, *Resolution 1483*, *supra* note 14, at 28-30. The legislative powers of the occupying power are thus designed to advance only its legitimate functions.

In the case of occupied territory, the application of the present Convention shall cease one year after the general close of military operations; however, the Occupying Power shall be bound, for the duration of the occupation, to the extent that such Power exercises the functions of government in such territory, by the provisions of the following Articles 1 to 12, 27, 29 to 34, 47, 49, 51, 52, 53, 59, 61 to 77, 143.

The ICJ considered this provision in the *Construction of a Wall* Advisory Opinion. The Court opined that:

A distinction is also made in the Fourth Geneva Convention between provisions applying during military operations leading to the occupation and those that remain applicable throughout the entire period of occupation . . . . Since the military operations leading to the occupation of the West Bank in 1967 ended a long time ago, only those Articles of the Fourth Geneva Convention referred to in Article 6, paragraph 3, remain applicable in that occupied territory.<sup>255</sup>

We submit that this textual interpretation, leading to the conclusion that long-term occupations reduce the responsibilities of occupying powers *vis-à-vis* the occupied civilian population, is an absurd conclusion; it is unwarranted by the text and is further incongruent with the purpose and legal practice of the normative regime of occupation, confusing a problem with a solution.<sup>256</sup>

Textually, Article 6 refers to a “general close of military operations.” It does not, however, refer to military operations “leading to the occupation.”<sup>257</sup> The latter is a judicial insertion. The realities of the occupation in general, and in particular the circumstances surrounding the construction of the wall (itself a military operation), attest to the fact of on-going military operations. Even a literal reading of the text of Article 6 should have revealed its inapplicability on its own terms. Indeed, Article 6 lends itself to an entirely different reading.

According to the language of Article 6, in an occupation that lasts longer than one year after the close of military operations, only 23 of the 32 articles comprising Section III of the Convention, which deals with occupied territories, would continue to apply.<sup>258</sup> The nine articles that would cease to apply include, for instance, the obligation incumbent on the occupying power to “facilitate the proper working of all institutions devoted to the care and education of chil-

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255. *Construction of a Wall*, *supra* note 6, ¶ 125. In para. 126, the Court proceeded to identify Articles 47, 49, 52, 53, and 59 of the Fourth Geneva Convention as relevant to the question at hand. For a similar interpretation, see Yoram Dinstein, *The International Legal Status of the West Bank and the Gaza Strip*—1998, 28 ISR. Y.B. HUM. RTS. 37, 42-44 (1998) [hereinafter Dinstein, *Legal Status*].

256. For a critical review of this aspect of the Advisory Opinion, see Orna Ben-Naftali, ‘*À La Recherche du Temps Perdu*’: Rethinking Article 6 of the Fourth Geneva Convention in the Light of the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion, 38(1-2) ISR. L. REV. 211 (2005) [hereinafter Ben-Naftali, *Temps Perdu*].

257. *Construction of a Wall*, *supra* note 6, ¶ 125. Note paragraph 135, where, in the context of addressing the term “military operations” in Article 53 in order to determine the existence of military exigencies, the Court said that such exigencies “may be invoked in occupied territories even after the general close of military operations that led to their occupation.” *Id.* at ¶ 135 (emphasis added).

258. While 43 of the 159 Articles of the Conventions continue to apply, the emphasis is on Articles 47-78 comprising the relevant Section III.

dren”<sup>259</sup> and “the duty of ensuring the food and medical supplies of the population.”<sup>260</sup> It is unreasonable to assume that the drafters of the Convention intended for children to be deprived of proper schooling or for the population to be deprived of medical supplies and food in long-term occupations; such an intention would defy the Convention’s main objective. The only reasonable conclusion, therefore, is that the working assumption behind Article 6 was that the situation of an occupation is bound to be relatively short and that responsibilities of this kind would be transferred to local authorities in a process leading to the end of the exceptional situation of occupation. The *travaux préparatoires* and the Commentary confirm this assumption.<sup>261</sup> Once reality defies the assumption, however, the rationale informing Article 6 disappears and, insofar as law is to make sense, it should no longer apply.

Subsequent developments in both law and legal practice lend support to our proposed reading of the provision. Once it became clear that the drafters’ assumption regarding the short duration of occupations was not supported by reality, and that this provision may be construed by occupying powers as limiting their responsibilities under the Convention precisely in situations where the those responsibilities should be expanded, the provision was abrogated: Article 3(b) of Additional Protocol I provides for the application of the Protocol’s provisions until the termination of the occupation.<sup>262</sup>

The argument that Article 6 of the Fourth Geneva Convention limits the Convention’s scope of applicability was never raised before Israeli Courts. Indeed, the Israeli High Court of Justice had applied provisions that would have otherwise become inapplicable in light of the language of Article 6.<sup>263</sup> This practice characterizes other prolonged occupations,<sup>264</sup> thereby lending support to the proposition that Article 3(b) of Protocol I enjoys customary status.<sup>265</sup>

259. Fourth Geneva Convention, *supra* note 67, at art. 50.

260. *Id.* at art. 55.

261. See 2A FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA 1949, 623-25; PICTET, *supra* note 68, at 63; GREEN, *supra* note 43, at 258 (2d ed., 2000); Roberts, *Prolonged Military Occupation*, *supra* note 33, at 56 (advancing four arguments for the inapplicability of Article 6).

262. Protocol I, *supra* note 27. See also COMMENTARY ON THE ADDITIONAL PROTOCOLS, *supra* note 120, at 66; Roberts, *Prolonged Military Occupation*, *supra* note 33, at 56. Admittedly, the language of Article 3(b) is unclear and could be construed as suggesting that it applies the Fourth Geneva Convention subject to its own terms. For this construction, see Dinstein, *Legal Status*, *supra* note 255. Such reading, however, defies both the drafters’ intention and the teleological test of international humanitarian law.

263. For example, Article 78 of the Fourth Geneva Convention was recently applied by the HCJ in *Ajuri*, *supra* note 103. For reviews of this judgment, see Daphne Barak-Erez, *Assigned Residence in Israel’s Administered Territories: The Judicial Review of Security Measures*, 33 ISR. Y.B. HUM. RTS. 303 (2003); Eyal Benvenisti, *Ajuri et al.—Israel High Court of Justice*, 3 September 2002, 9 EUR. PUB. L. 481 (2003) [hereinafter Benvenisti, *Ajuri*]; Orna Ben-Naftali & Keren Michaeli, *The Call of Abraham: Between Man and ‘Makom’: Following HCJ 7015/02 Ajuri v. IDF Commander in the West Bank*, 15 HAMISHPAT 56 (2003) (Hebrew). Note that while Article 78 provides less for the obligations and more for the rights of the Occupying Power, endowing it with the power to subject protected persons to assigned residence and to internment, the fact remains that the Court applied this provision, regardless of Article 6.

264. Roberts, *Prolonged Military Occupation*, *supra* note 33, at 55.

265. On the customary status of most of the Protocol I provisions, see *supra* note 85.

Further, the Court's determination regarding the limited scope of applicability of the Fourth Geneva Convention is incongruent with—and defies the rationale behind—its determination regarding the applicability of various human rights instruments together with humanitarian law in occupied territories. This co-application is designed to offer greater protection to the civilian population. It is this incongruence which explains the odd conclusion of the Court that Israel had violated some of its human rights obligations, but not those very same obligations as they appear in the Fourth Geneva Convention.<sup>266</sup> The implication is that human rights law came into play to fill a lacuna in the Geneva Convention, despite the fact that the Convention contains relevant provisions. The lacuna, therefore, is constructed only to be filled by another, and less suitable normative source (in so far as humanitarian law, as distinct from human rights law, is the *lex specialis* in situations of occupation).<sup>267</sup> This does not make sense.

It follows from the above that a proper reading of Article 6 should have generated the conclusion that this provision has, as Roberts suggested, “correctly identified [the] problem” of prolonged occupation, but failed to offer a proper solution.<sup>268</sup> It is regrettable that the Court confused the solution with the problem. Had it engaged in a discussion of the temporal assumption informing the Fourth Geneva Convention, it could have not merely produced a better reading of Article 6, but further shed light on the temporal limitations of an occupation. The remaining part of this Section offers such a discussion.

*(c) The Temporary/Indefinite Indeterminacy and the Construction of “Reasonable Time”*

There is thus overwhelming evidence for the proposition that the normative regime of occupation requires that it be temporary.<sup>269</sup> There are, however, no exact time limits set for its duration. This absence has been explained, indeed explained away, by Justice Shamgar of the Israeli Supreme Court as being reflective of “a factual situation,” generating the conclusion that, “pending an alternative political or military solution this system of government could, from a

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266. For instance, Article 50, protecting children's right to education, does not apply, but this very same right as it appears in Article 28 of the Convention on the Rights of the Child and Articles 10, 13, and 14 of the ICESCR, *supra* note 78, does apply. Similarly, Articles 55 and 56, which stipulate the duty of the occupant to ensure the population's health through provision of food and medical supplies and the maintenance of medical and hospital establishments, have no applicability while similar duties, far less specific, clear, and legally binding, enshrined in Articles 11 and 12 of the ICESCR (the right to an adequate standard of living and the right to health respectively) and Articles 24 and 27 of the CRC (the rights to health and adequate standard of living and development respectively) do apply.

267. The ICJ itself determined that, while international human rights law is applicable to situations of armed conflicts, international humanitarian law is the *lex specialis*. See *Construction of a Wall*, *supra* note 6, ¶¶ 104-06. A similar determination was made by the ICJ in its *Nuclear Weapons* Advisory Opinion, *supra* note 52, ¶ 25. On the co-application of human rights law and humanitarian law to occupied territories, see Ben-Naftali & Shany, *Living in Denial*, *supra* note 98.

268. Roberts, *Prolonged Military Occupation*, *supra* note 33, at 57.

269. See *Construction of a Wall*, *supra* note 6, Separate Opinion of Judge Elaraby, ¶ 3.1; Separate Opinion of Judge Koroma, ¶ 2.



legal point of view, continue indefinitely.”<sup>270</sup> This argument is not persuasive.

A legal point of view is not merely reflective of a factual situation, nor does it sanction the substitution of “indefinite” for “temporary.” A temporary situation has a definite end. An indefinite situation may, or may not, have an end. The two situations are very different. In order to appreciate the point, it is useful to reflect momentarily on the human condition, which is largely controlled by our awareness that our existence is temporary. Were we to conceive of our existence as indefinite, it is quite likely that the human condition would be altered significantly. “Under the heaven,” we may hopefully presume, there is “a time for every purpose,” but on earth, we humbly acknowledge, time is a limited resource.<sup>271</sup> Time thus affects us individually and socially and it is our awareness of the temporary nature of the human existence which shapes our social institutions, including our law.

Far from reflecting time as naturally indefinite, law allocates, distributes, and mediates time as a “commodity, the supply of which is not inexhaustible.”<sup>272</sup> Law shapes our perceptions of the realities of time as a historical, social, cultural, and political construct.<sup>273</sup> Law thus defines not only the supposedly natural time of birth and death, of childhood and adulthood, but it also incorporates certain assumptions about individual and collective time to delineate rights and duties.<sup>274</sup> Indeed, the very principle of legality, as well as foundational legal presumptions, contain embedded conceptions of demarcated time, without which they, and law itself, would be meaningless.<sup>275</sup>

Law, then, is preoccupied with time. Given that the distribution of limited resources is a major legal function, the construction of time as a limited resource implies that law is interested in the distribution of time. Time, however, unlike other natural commodities, is *construed* as limited. As such, it cannot be distributed *in abstracto*, but only in relation to a concrete action. Indeed, it is the very conception of time as a limited resource that endows the concrete action with meaning and requires time allocation relative to competing interests.

270. Shamgar, *Legal Concepts*, *supra* note 88, at 43. Justice Shamgar served as a judge in the Israeli Supreme Court since 1975 and as its Chief Justice since 1983.

271. *Ecclesiastes* 3:1.

272. William H. Rehnquist, *Successful Lawyers Pay the Price*, 82 A.B.A. J. 100 (1996).

273. On the ways time is conceived by law, see generally Carol J. Greenhouse, *Just in Time: Temporality and the Cultural Legitimation of Law*, 98 YALE L. J. 1631 (1989); David M. Engel, *Time and Community*, 21 L. & SOC'Y REV. 605 (1987); Rebecca R. French, *Time in the Law*, 72 U. COL. L. REV. 663 (2001); TODD RAKOFF, *THE LAW OF SOCIAL TIME: A TIME FOR EVERY PURPOSE: LAW AND THE BALANCE OF LIFE* (2002); JED RUBENFELD, *FREEDOM AND TIME: A THEORY OF CONSTITUTIONAL SELF-GOVERNMENT* (2001).

274. Statutes of limitations; jurisdictional time limits; civil and criminal procedure laws; the laws of evidence, intellectual property protections; the rule against perpetuities; and sentencing are but examples that immediately come to mind and all embody legal assumptions about human interaction with time.

275. For example, the principle of *nullum crimen sine lege*, that is, of non-retroactivity, is meaningful only due to the centrality of the concept of time. Similarly, any legal presumption would have been rendered meaningless were it not for the temporal dimension which allows for its refutation.

An example may illustrate this point. Administrative detention is a concrete action which involves two competing interests: the public safety on the one hand, and the human right to liberty on the other hand. As time is understood as a limited resource, the individual cannot be detained indefinitely and it is for this reason that a reasonable time limit is set on the action.<sup>276</sup> Clearly, if temporality was not of the essence in administrative detention, the competing interests would be meaningless. In this sense, it is time, then, that delineates liberty and renders it meaningful; if administrative detention were permitted indefinitely, liberty would have lost its meaning.

It is equally unreasonable to place the concrete situation of occupation within an indefinite time frame. If occupation “could, from a legal point of view, continue indefinitely,” the interests it is designed to protect—the interest of the occupied people to reach the point in time when they regain control over their lives and exercise their right to self-determination, and the interest of the international system in resuming its normal order of sovereign equality between states—would be rendered meaningless. Thus, the core assumptions of the normative regime of occupation would be defied if an occupation can be stymied indefinitely. The temporary, as distinct from the indefinite, nature of occupation is thus the most necessary element of the normative regime of occupation, as it gives meaning and effect—both factual and legal—to the concepts of liberty, freedom, and the right to self-determination.

The notion of “reasonable time” underlies any concrete limits set by law on the duration of an action. The very same rationale holds for setting limits on the duration of actions which are not defined in concrete temporal terms; the conclusion that actions not defined in concrete temporal terms somehow transform the temporary into the indefinite is unreasonable. Indeed, in such situations, the concrete time limit is determined by the legal construct of “reasonable time,” deriving from the legal principle of “reasonableness.”<sup>277</sup> What is a reasonable time for an action depends on the nature, purpose, and circumstances of the action.<sup>278</sup>

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276. Even the Israeli Military Order Number 1229 provides that a period of detention shall not exceed six months, although it may be extended in light of security considerations. While Order No. 1229 does not mandate that the detainee be brought before a judge prior to his detention, it does allow detainees to appeal their detention or extension of detention before a military judge. See B’TSELEM, *available at* [http://www.btselem.org/english/Administrative\\_Detention/Israeli\\_Law.asp](http://www.btselem.org/english/Administrative_Detention/Israeli_Law.asp).

277. The principle of reasonableness is a general principle of international law. Its application has generated the conclusion that a right cannot be exercised in a wholly unreasonable manner causing harm disproportionate to the right holder’s interests. See BIN CHENG, *GENERAL PRINCIPLES OF LAW: AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 121-23 (1987); See also WTO, *REPORT OF THE APPELLATE BODY IN UNITED STATES - STANDARD FOR REFORMULATED AND CONCENTRATED GASOLINE AND LIKE PRODUCTS OF NATIONAL ORIGIN*, reprinted in 35 I.L.M. 603, 626 (1996).

278. For example, the Uniform Negotiable Instruments Law sets standards for the measurement of “reasonable time.” See RICHARD SPEIDEL & STEVE H. NICKS, *NEGOTIABLE INSTRUMENTS AND CHECK COLLECTIONS (THE NEW LAW) IN A NUTSHELL* 60, 61, 148, 149, 152 (4th ed. 1993). Similarly, the “reasonable time” for taking an action is contemplated in the Uniform Commercial Code (Colorado) as depending “on the nature, purpose and circumstances of such action.” See

(d) *Applying the Construction of "Reasonable Time" to the OPT: The Purpose, Nature, and Circumstances of the Occupation*

(i) *The Purpose of the Occupation*

Given the preceding discussion regarding the inalienability of sovereignty, the nature of the relationship between the occupied population and the occupying power as a form of trust, and the related rationale for the temporary nature of an occupation, it is clear that the purpose of the regime of occupation is to manage the situation in a manner designed to bring about political change and to generate a resumption of the normal order of international society. Relevant international norms further decree that this change should come about by peaceful means<sup>279</sup> and realize the principle of self-determination.<sup>280</sup> The positions taken by the ICJ, the General Assembly, and the Security Council with respect to the illegality of South Africa's post-mandate presence in Namibia all serve to underscore the point.<sup>281</sup> Israel's indefinite occupation frustrates the purpose of this regime.

(ii) *The Nature of the Occupation*

Indeed, it is not only the purpose of the regime of occupation, but also its essential nature, that may well be defied if the occupation is allowed to continue indefinitely. The occupied population under foreign control does not enjoy the full range of human rights, in the very least insofar as it is deprived of citizenship and the rights attached to that status. The prolongation of such a situation may well be in the interests of an occupying power who may rely on the provisions of the law relative to the maintenance of the status quo, as well as to its security concerns, to the detriment of the population. Given that the occupant is likely to treat its own citizens in a manner vastly different from the manner with which it treats the occupied population, the result may well be the *de facto* institutionalization of Apartheid of some sort.<sup>282</sup> Such a scenario, while ostensibly legal in terms of a "rule-book" conception of the rule of law, is manifestly illegal in terms of a "right" conception of the rule of law.<sup>283</sup> Indeed, in making the

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<http://www.law.du.edu/russell/contracts/ucc/4-1-204.htm>. The Israeli Supreme Court has itself resorted to the principle of reasonable time in order to determine the time limits of a judicial institutionalization order. See C.A. 3845/02, *Anonymous v. The District Adult Psychiatric Committee* (unpublished). This determination relied on a similar decision by the U.S. Supreme Court, *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

279. U.N. Charter, *supra* note 13, at art. 2(3).

280. See *supra* section II.A.2.b. The fact that current international law legitimizes an armed struggle by occupied people attempting to realize their right to self-determination and emerge as a new sovereign state attests to the importance attached to the realization of this right.

281. See *supra* notes 152-55 and accompanying text.

282. Roberts, *Prolonged Military Occupation*, *supra* note 33, at 52. See also *supra* note 213 and accompanying text.

283. To use Dworkin's reference to a formal and a substantive conception of the rule of law: the former is interested in the enforceability of law regardless of its content, that is, in order; the latter is interested in the substance, nature and justification of the order, determined by the balance

very rule of law a casualty of an indefinite occupation, it corrupts the law.<sup>284</sup>

(iii) *The Circumstances of the Occupation*

The achievement of the purpose of a peaceful political change leading to a new sovereign state is a major policy issue. Matters of policy necessitate planning designed to achieve the desired result. Such planning, especially in respect of complicated and bitterly contested political issues that are not within the absolute control of one party, as is the Israeli-Palestinian conflict, is neither a trivial nor an immediate matter. It is a long-term process; it may be incremental; and it may, indeed, fail. It is possible, however, to evaluate whether such a policy was in the making *ex ante*. This evaluation requires the examination of the circumstances of the specific occupation.

The most relevant circumstances to be examined in this respect are whether the occupying power has annexed the occupied territory or has otherwise indicated an intention to retain its presence there indefinitely. The examination of Israel's annexation of East Jerusalem, the expropriation of vast portions of Palestinians land to establish settlements in the OPT, to construct the bypass roads,<sup>285</sup> and, most recently, to erect the Wall, all suggest such an intention. The Wall, especially, merits our brief attention.

As noted in the preceding subsection,<sup>286</sup> the Wall's route does not follow the 1967 border. While its final path is yet unclear and, indeed, changes regularly in response to internal<sup>287</sup> and external<sup>288</sup> pressures, it is clearly designed to incorporate major settlements and many settlers into the Israeli side of it. In some areas it creates a barrier that encircles Palestinian villages; in others, it isolates them from the rest of the West Bank.<sup>289</sup> The Special Rapporteur of the UN

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thereby achieved between the individual and society; between liberty and security. *See generally* RONALD DWORKIN, A MATTER OF PRINCIPLE 11 (1985).

284. *See* 2002 REPORT ON THE VIOLATIONS OF HUMAN RIGHTS IN THE OCCUPIED ARAB TERRITORIES, *supra* note 31, at 12 ("the rule of law is one casualty of the conflict in the occupied Palestinian Territory, but the main casualties are the people of both Palestine and Israel").

285. *See supra* notes 173-77; 187-95; 217-27 and accompanying text.

286. *See supra* note 185, 227 and accompanying text.

287. Internal pressures emanate from the settlers who are represented in the Government, on the one hand, and from the Israeli High Court of Justice, on the other hand. The Court, having determined that the current route in sections of the Wall that were the subject of the appeal fails to meet the proportionality test of both international humanitarian law and Israeli administrative law, ordered the re-routing of a 20-mile section of what is termed in Israel the "separation fence." *See* H.C. 2056/04, *Beit Surik case*, *supra* note 103. The same rationale, generating similar results, was applied in H.C. 7957/04, *Mara'abe case*, *supra* note 103. Similar appeals pertaining to other segments of the wall are currently pending before the HCJ.

288. The most notable external pressure stems from the *Construction of a Wall*, *supra* note 6. The opinion, which was rendered pursuant to a request submitted by the U.N. General Assembly, G.A. Res. A/RES/ES-10/14, U.N. GAOR, 10th Emer. Sess. 23d Plen. Mtg. (Dec. 8, 2003), held that the construction of the Wall in any part of the OPT is illegal and specified the legal consequences emanating from said illegality. The Opinion was adopted by the General Assembly in GA Res. A/ES-10/L.18/Rev. 1 (July 20, 2004) (150 votes in favor, 6 against and 10 absentes).

289. It should, however, be noted that this kind of effect on Palestinian villages is taken into consideration by the HCJ in determining whether the route of the wall meets the standard of propor-

Commission on Human Rights concluded that “the construction of the Wall within the West Bank and the continued expansion of settlements, which, on the face of it, have more to do with territorial expansion, *de facto* annexation or conquest, raise serious doubts about the good faith of Israel’s justifications in the name of security.”<sup>290</sup> The ICJ’s conclusion on this issue is quite pertinent:

Whilst the Court notes the assurance given by Israel that the construction of the wall does not amount to annexation and that the wall is of a temporary nature . . . it nevertheless cannot remain indifferent to certain fears expressed to it that the route of the wall will prejudice the future frontier between Israel and Palestine, and the fear that Israel may integrate the settlements and their means of access. The Court considers that the construction of the wall and its associated regime create a “fait accompli” on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to *de facto* annexation.<sup>291</sup>

Had the Court entertained the notion that the space between the “temporary” and the “permanent” is inhabited by the “indefinite,” its conclusion would have—and should have—been that the construction of the Wall is indicative less of a *de facto* annexation that may happen in the (permanent) future, and more of such an annexation that has been effected in the (indefinite) present.

When one considers the huge investment of Israeli resources to build the Wall,<sup>292</sup> and the territorial expansion the Wall achieves,<sup>293</sup> the only reasonable conclusion is that Israel, far from treating the OPT as a negotiation card to be returned in exchange for peace, has already effected a *de facto* annexation of<sup>294</sup>

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tionality and accounts for the recent decision ordering the state to change its course. See H.C. 7957/04, *Mara’abe case*, *supra* note 103.

290. See 2003 REPORT ON THE SITUATION OF HUMAN RIGHTS IN THE PALESTINIAN TERRITORIES, *supra* note 176, at 15.

291. *Construction of a Wall*, *supra* note 6, ¶ 121.

292. While it is virtually impossible to calculate the total investment, as it runs the whole gamut from military expenditure to monetary incentives to settlers, some figures are sufficiently telling for the present discussion: during the last decade, the Israeli Government invested \$2.5 billion in constructing new houses in the OPT, 50% of which was public, compared with 25% public financing inside the green line. During the same period, the Government allocated to municipalities an average of NIS 5,428 per settler, a year, compared to 3,807 per citizen in Israel. See SHLOMO SVIRSKI ET AL., GOVERNMENTAL FUNDING OF ISRAELI SETTLEMENT IN JUDEA AND SAMARIA AND THE GOLAN HEIGHTS IN THE NINETIES: MUNICIPALITIES, HOUSING AND ROADS CONSTRUCTION (Jan. 2002) (Hebrew), available at <http://www.adva.org/ivrit/diur.html>. Just the cost of constructing the by-pass roads in the OPT since Oslo has been estimated at more than \$265 million. See Ze’ev Schiff, *The March of Folly of the By-Pass Roads*, HA’ARETZ, Feb. 15, 2002, at B1. The projected cost of the Wall is \$1.4 billion. 2003 REPORT ON THE SITUATION OF HUMAN RIGHTS IN THE PALESTINIAN TERRITORIES, *supra* note 176, at 8.

293. See *supra* notes 185, 287-91 and accompanying text.

294. Unlike the *de jure* annexation of East Jerusalem, the actions described in the text lack the official act of annexation, but nevertheless amount to a *de facto* annexation, effected without giving the Palestinians the rights of citizenship, made visibly and materially clear by the planned path of the Wall. As noted by the Special Rapporteur of the UN Commission on Human Rights, John Dugard, “Language is a powerful instrument. This explains why words that accurately describe a particular situation are often avoided.” Focusing merely on the Wall, the Special Rapporteur observed that “[T]he Wall that Israel is presently constructing within the territory of the West Bank . . . goes by the name of ‘Seam Zone,’ ‘Security Fence’ or ‘Separation Wall’.” The word ‘annexation’ is avoided as it is too accurate a description and too unconcerned about the need to obfuscate the

a substantial part of the OPT.<sup>295</sup> The resulting political geography of the OPT, having been thus divided into a multitude of non-contiguous cantons, would not allow the Palestinians to exercise their right to self-determination in a viable sovereign State,<sup>296</sup> frustrating the desired political change clearly articulated by the Security Council.<sup>297</sup> The question remains whether Israel's security concerns justify the settlements and the chain of actions following their establishment.

(iv) *The (Im)balance of Security Revisited*

Israel claims that its actions are justified by legitimate security concerns, especially in the light of suicide bombing, and that they are simply temporary measures evidencing no intention to alter political boundaries.<sup>298</sup> This argument, however, is untenable on the basis of both substantive law and the facts on the ground.

It is clear that the substantive law of occupation recognizes the legitimate security concerns of the occupying power. However, such recognition does not extend to all means and methods used to arguably further this security.<sup>299</sup> Indeed, it does not extend to settlements: paragraph six of Article 49 of the Fourth Geneva Convention contains no exception to its prohibition of settlements on the grounds of such security considerations; security concerns cannot, therefore,

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truth . . . The fact must be faced that what we are presently witnessing in the West Bank is a visible and clear act of territorial annexation under the guise of security . . . Annexation of this kind goes by another name in international law—conquest.” 2003 REPORT ON THE SITUATION OF HUMAN RIGHTS IN THE PALESTINIAN TERRITORIES, *supra* note 176, at 6, 8.

295. Ze'ev Schiff, a leading commentator in Ha'Aretz newspaper, contemplating merely the cost of the by-pass roads, concluded that:

three explanations stand behind this reality. The first is that these expenditures express an intention never to give up the territories and all the rest is an illusion. The second is that we have decided to build, step-by-step, the road system of the Palestinian State that will be established in the territories, at the expense of the Israeli taxpayer. The third possible explanation is that the governmental systems of Israel have been dragged into this as if forced by a demon and without anyone being able to stop the March of Folly.

Schiff, *supra* note 292. Given that governments are not presumed to be possessed by demons, the obvious cynicism of the second explanation, and the broader context and *raison d'être* of the by-pass roads, that is, the settlements' enterprise, the first explanation is clearly the only reasonable conclusion. See also Ran HaCohen, *Letter from Israel*, Mar. 1, 2002, available at <http://antiwar.com/hacohen/pf/p-h030102.html>. The concern that the Wall is tantamount to annexation was the focus of the debate held during the 4841th Security Council meeting on October 14, 2003. See U.N. Press Release SC/7895, In Day-Long Security Council Meeting, Palestine Observer Says Israeli Security Wall Involves De Facto Annexation of Occupied Land (Oct. 14, 2003), available at <http://www.un.org/News/Press/docs/2003/sc7895.doc.htm>.

296. See 2003 REPORT ON THE SITUATION OF HUMAN RIGHTS IN THE PALESTINIAN TERRITORIES, *supra* note 176, at 14. The ICJ reiterated this position in *Construction of a Wall*, *supra* note 6, ¶ 122.

297. S.C. Res. 1397, *supra* note 140 (envisioning “a region where two states, Israel and Palestine, live side by side within secure and recognized borders”).

298. *Construction of a Wall*, *supra* note 6, ¶ 116.

299. See *supra* notes 161-69 and accompanying text.

render the settlements a valid security measure.<sup>300</sup> Even if, for the sake of argument, one dissociates the construction of the Wall from the settlements and examines the legality of this one measure in isolation, it would be hard to legally sustain the security claim in view of the fact that a significant portion of the Wall does not actually separate Palestinians from Israelis; rather, it separates them from other Palestinians. This separation of Palestinian from Palestinian renders Israeli security claims vacuous and bolsters the argument that the Wall disproportionately hurts Palestinians. Given that the Wall, much like the bypass roads and the settlements themselves, are as inseparable in reality as they are in applicable law, the legal grounds for the Israeli position are tenuous at best.

Further, the credibility of the "temporary" label Israel attaches to these alleged security measures is seriously questionable given the relevant legal history. It is through allegedly temporary "requisition for military needs" orders that Palestinian lands were seized. These lands were never returned.<sup>301</sup> It is quite instructive, in this context, to ponder the Israeli State Attorney's response to the Israeli High Court of Justice in the context of an appeal against the construction of the Wall:

The State is not prevented from seizing land by means of temporary seizure orders even for the purpose of erecting structures that are not necessarily temporary in nature. By way of illustration: in Judea and Samaria, temporary seizure orders have been used to erect permanent structures of many kinds, such as bypass roads and Israeli communities.<sup>302</sup>

This language game between the "temporary" and the "permanent" functions to legitimize actions that would have been otherwise prohibited, and is, in fact, made possible once an occupation has ceased to be, and to be conceived as, temporary. Such an occupation, as the discussion pertaining to its purpose, nature, and circumstances demonstrates, has exceeded its reasonable duration. Such an occupation, in substituting an indefinite for a temporary control, violates the basic principle of temporariness underlying the normative regime of occupation.

The above does not suggest that the occupation is permanent. The recent withdrawal of Israel from the Gaza Strip shows that a political decision can effect the dismantling of settlements and, perhaps, lead to the end of occupation. The discussion does suggest, however, that in substituting an "indefinite" for a "temporary" occupation, Israel has violated the normative regime of occupation. It is instructive to note in this context that following the political decision to

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300. *Construction of a Wall*, *supra* note 6, ¶ 135.

301. LAND GRAB, *supra* note 174.

302. Comm. App./2597, Kafr 'Aqeb Development Committee et al. v. Ministry of Defense et al., Response of the State, at sec. 33/c, reproduced in BEHIND THE BARRIER, B'TSELEM HUMAN RIGHTS VIOLATION AS A RESULT OF ISRAEL'S WALL: POSITION PAPER (APRIL, 2003) [hereinafter *Kafr 'Aqeb Development Committee*], available at [http://www.diak.org/Roadmap/2003\\_Behind\\_The\\_Barrier\\_Eng.htm#\\_ftnref84](http://www.diak.org/Roadmap/2003_Behind_The_Barrier_Eng.htm#_ftnref84). The HCJ itself had, in the past, accepted this logic when it contemplated, and authorized, the temporary seizure of Palestinian land for the building of permanent settlements. See H.C. 610/78, Ayun v. Minister of Defense, 33(2) P.D. 113, 131 (Opinion of Judge Landau); *Id.* at 134 (Opinion of Judge Ben-Porat).

withdraw from, and dismantle the settlements in, the Gaza Strip, the Israeli High Court of Justice emphasized the temporary—as distinct from the indefinite—nature of occupation to deny the settlers' claim to remain in the settlements.<sup>303</sup> This decision is normatively sound. The fact that it was never made in order to question the legality of the settlements enterprise in the preceding decades demonstrates that the temporary/indefinite indeterminacy is being used to legitimize power, not to contain it: the temporary nature of occupation was resurrected to replace its “indefinite” construction only when a political decision to pull-out was reached.

In conclusion, the very same actions which indicate that the occupation can no longer be regarded as temporary also disclose the violation of the substantive constraints imposed by the law of occupation on the managerial discretion of the occupying power; they amount to a *de facto* annexation of large portions of the occupied territory and entail gross violations of humanitarian and human rights norms and defy both the principle of the inalienability of sovereignty and the principle of trust. The violation of the temporal constraints cannot but violate the two other basic tenets of the law of occupation; the latter necessarily generate the conclusion that an occupation must be temporary. The Israeli occupation, having thus violated the three basic principles underlying the normative regime of occupation, is a conquest in disguise. It is, therefore, intrinsically illegal. The examination of its legality from an extrinsic perspective is undertaken in Section II.B below.

#### *B. Extrinsic Dimensions of the Israeli Occupation of the OPT: The Nomos<sup>304</sup> of Occupation*

The above discussion of the intrinsic dimensions of the Israeli occupation of the OPT concentrates on the way Israel has managed the occupation in the light of the foundational normative standards set by the law of occupation. Its focus, thus, is the *substance* of the normative regime of occupation; it serves as a measuring-rod for assessing various actions undertaken by the Occupant. In this section, the focus shifts to the normative and political *structure* of the occupation as a situation distinct from the regular order of the international society; we

303. H.C.J. 1661/05, *Regional Council Gaza Beach case*, *supra* note 207, ¶¶ 8-9, 115, 126.

304. The use of the term “*nomos*” in the section’s title encompasses its varied meanings for Cover, for Schmitt and for Agamben. For Cover, it indicates a normative universe, comprising both rules and the narratives that give them meaning. See Robert Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983). For Schmitt, it meant that right as original violence, as difference, rather than universalistic rationality being the foundation of law. See CARL SCHMITT, *DER NOMOS DER ERDE* (1974), discussed in Carlo Galli, *The Critic of Liberalism: Carl Schmitt’s Antiliberalism: Its Theoretical and Historical Sources and Its Philosophical and Political Meaning*, 21 CARDOZO L. REV. 1597, 1601 (2000). Giorgio Agamben’s analysis brings Schmitt’s theory of the exception, explicated in this section, to its logical conclusion by stating that the concentration camp—as a paradigmatic structure—has become the modern political *nomos*: the space where the exception and the rule, the fact and the norm, are indistinguishable and law becomes meaningless. See GIORGIO AGAM BEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* 166, 167-80 (Daniel Heller-Roazen trans., 1988).



focus on its exceptionality.

Structurally, the law of occupation bears strong resemblance to an emergency regime. This regime, with roots dating back to the Roman-Commissarial model, rests on three precepts: exceptionality, limited scope of powers, and temporary duration.<sup>305</sup> In this discourse, then, a situation of emergency is separated and distinguished from the ordinary state of affairs as it signifies an occurrence which does not conform to the rule. Because the emergency situation is the exception, its duration must be limited and it must generate no permanent effects; it merely suspends the rule.<sup>306</sup> This is also why the norm is regarded as superior to the exception: the existing legal order defines the terms under which it is suspended, and the powers granted in such a situation are to be used for the purpose of an expeditious re-establishment of the status quo, that is, of a return to normalcy.<sup>307</sup>

The basic tenets of the normative regime of occupation in the international arena largely conform to this constitutional model. The normal order of affairs is based on the principle of sovereign equality between states that are, at least to some extent, presumed to be founded on the ideas of self-government and self-determination. The severance of the link between sovereignty and effective control, and life under foreign rule, constitute an exceptional state of affairs and the law of occupation recognizes it as an exception; it is to be managed so as to ensure return to normalcy. This is why the occupant has only limited powers in terms of both scope and time, and is not permitted to act in a manner designed to yield permanent results.<sup>308</sup>

Indeed, modern studies of emergency situations concerned with the derogation from human rights law thereby occasioned have concluded that: "[a]bove and beyond the rules . . . one principle, namely, the principle of provisional status, dominates all others. The right of derogation (of human rights) can be justified solely by the concern to return to normalcy."<sup>309</sup> This conclusion holds true and applies equally to occupation.

A reversal of the relationship between the norm and the exception gener-

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305. See THEODOR E. MOMMSEN, *THE HISTORY OF ROME* 325, 326 (1908). For later references to this classical model, see, for example, NICOLO MACHIAVELLI, *THE DISCOURSES* 194, 198 (Bernard Crick ed. & Leslie Walker trans., 1970); JEAN JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND DISCOURSES* 293, 294-96 (G.D.H. Cole trans., Alfred A. Knopf 1993).

306. For the essential features of the traditional model of emergency powers, see Oren Gross, *Exception and Emergency Powers: The Normless and Exceptionless Exception: Carl Schmitt's Theory of Emergency Powers and the "Norm-Exception" Dichotomy*, 21 *CARDOZO L. REV.* 1825, 1836-39 (2000) [hereinafter *Exception and Emergency Powers*].

307. *Id.*

308. See *supra* section II.A.1-4.

309. STUDY OF THE IMPLICATIONS FOR HUMAN RIGHTS OF RECENT DEVELOPMENT CONCERNING SITUATIONS KNOWN AS STATE OF SIEGE OR EMERGENCY, U.N. ESCOR, 35th Sess., Agenda Item 10, 69 U.N. Doc. E/CN.4/Sub.2/1982/15 (1982) (N. Questiaux). See also Oren Gross & Fionnuala Ni Aolain, *To Know Where We Are We Need To Know Where We Are: Revisiting States of Emergency*, in *HUMAN RIGHTS: AN AGENDA FOR THE 21<sup>ST</sup> CENTURY* 79 (Angela Hegarty & Siobhan Leonard eds., 1999).

ates, as of necessity, the terminus of every normative system.<sup>310</sup> Carl Schmitt's political theology, wherein the norm becomes subservient to the exception, is both a precedent and a warning. "The rule," said Schmitt, "proves nothing; the exception proves everything: it confirms not only the rule but also its existence, which derives only from the exception."<sup>311</sup> The state of emergency, which in German is called a "state of exception" (*Ausnahmezustand*), is one where the rule of man prevails over the rule of law<sup>312</sup> and where the Leviathan reigns supreme.<sup>313</sup> The result is a Hobbesian state of war—indeed the clearest case of an exception—where, bereft of any rights, the only meaningful distinction for a person to make is between the reified constructs of 'friend' and 'foe'.<sup>314</sup> This situation signifies the destruction of both the normative regime of the exception, and of the general rule. From a normative perspective, it is thus as meaningless as it is indefensible.<sup>315</sup>

One lesson to be drawn from the above is the importance of retaining a clear distinction between fact and norm; between the rule and the exception, lest the exception becomes a new rule, and generates a new conception of reality. This is important because in this new conception of reality, one's security habitually overrides one's enemy's human rights.<sup>316</sup> Indeed, the reversal of the relationship between the rule and the exception operates as a legitimizing device allowing for a discussion of various specific violations of human rights carried out in the name of security as if they are the exception to the normal order of things, thereby obfuscating the fact that the violations have become the rule, not

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310. Giacomo Marramo, *Schmitt and the Categories of the Political: The Exile of the Nomos: For a Critical Profile of Carl Schmitt*, 27 CARDOZO L. REV. 1567 (2000).

311. SCHMITT, POLITICAL THEOLOGY, *supra* note 16, at 15.

312. Heiner Bielefeld, *Carl Schmitt's Critique of Liberalism: Systemic Reconstruction and Countercriticism*, 10 CAN. J. L. & JURIS. 65, 68 (1997).

313. Schmitt was fascinated with Hobbes and regarded himself as his heir, ending his commentary on Hobbes' Leviathan with the words: "You shall no longer teach in vain, Thomas Hobbes." See CARL SCHMITT, THE LEVIATHAN IN THE STATE THEORY OF THOMAS HOBBS: MEANING AND FAILURE OF A POLITICAL SYMBOL (George Schwab & Erna Hilfstein trans., 1996). On the affinity between Schmitt and Hobbes, see David Dyzenhaus, *Now the Machine Runs Itself: Carl Schmitt on Hobbes and Kelsen*, 16 CARDOZO L. REV. 1 (1994); John P. McCormick, *Fear, Technology and the State: Carl Schmitt, Leo Strauss and the Revival of Hobbes in Weimar and National Socialist Germany*, 22 POL. THEORY 619 (1994).

314. For Schmitt's 'friend'/'enemy' distinction, see CARL SCHMITT, THE CONCEPT OF THE POLITICAL, 25-37 (J. Harvey Lomax trans., 3rd ed. 1996). For an analysis, see Andrew Norris, *Carl Schmitt on Friends, Enemies and the Political*, TELOS 68 (Summer 1998). On the odd history of Schmitt's reception in the Anglo-American academia, see Emanuel Richter, *The Critic of Liberalism: Carl Schmitt: The Defective Guidance for the Critique of Political Liberalism*, 21 CARDOZO L. REV. 1619 (2000).

315. This was the political theology of the Third Reich. On Schmitt's defense of the President's action in July 1932 in *Prussia v. Reich*, which was based on his construction of emergency, see DAVID DYZENHAUS, LEGALITY AND LEGITIMACY: CARL SCHMITT, HANS Kelsen AND HERMANN HELLER IN WEIMAR 70-85 (1997).

316. Harold Lasswell noted that "[a]n insidious outcome of continuing crisis is the tendency to slide into a new conception of normality that takes vastly extended control for granted, and thinks of freedom in smaller and smaller dimensions." HAROLD D. LASSWELL, NATIONAL SECURITY AND INDIVIDUAL FREEDOM 29 (1950), *quoted in* Gross, *Exception and Emergency Powers*, *supra* note 306, at n.155.

the exception.

The Schmittian exception, reflects Giorgio Agamben in his book *Homo Sacer*, has generated the conditions of possibility for the concentration camp, a space created once the exception—the temporary suspension of the rule—becomes the rule.<sup>317</sup> This space, where the extraordinary and the provisional condition becomes ordinary and permanent, says Agamben, is not limited to Nazi concentration camps. It is paradigmatic to every situation where the political machinery of the modern nation state finds itself in a continuous crisis and decides to take it upon itself to defend the biological life of the nation, collapsing human rights into citizens' rights,<sup>318</sup> subsuming humanity into citizenry, and making the former the "exceptionless exception."<sup>319</sup> In such a situation, the enemy, stripped of human rights, is stripped of his humanity. Having been excluded from the body-politic, he has only his own body as a political tool and it is through this political body that he interacts with the body-politic that has thus reified him.<sup>320</sup> This may well be the typology of the suicide bomber. It does not justify his actions which may amount to war crimes and, when directed against civilians, may amount to crimes against humanity,<sup>321</sup> but it does contextualize them.

In order to contain the eruption of a Schmittian friend/enemy politic, the international rule of law recognized the situation of occupation as an exception. It created a normative regime designed to ensure that the effective control of the occupying power is exercised in a manner that is temporary, respectful of the humanitarian needs and human rights of the occupied population, and leads to an expeditious return to normalcy based on sovereign equality. An occupation that fails to do this is substantively and intrinsically illegal (in terms of the law of occupation), as well as structurally and extrinsically illegal (in terms of the international legal order which provides the normative framework within which the law of occupation operates). The Israeli occupation of the OPT has thus failed.

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317. AGAMBEN, *supra* note 304, at 166-68.

318. *Id.* at 126-31, 174-76. Agamben, noting the very ambiguity of the title "*Declaration des droits de l'Homme et du Citoyen*" refers in this context to Arendt's discussion of the paradox wherein "[T]he Conception of human rights, based upon the assumed existence of a human being as such, broke down at the very moment when those who professed to believe in it were for the first time confronted with people who had indeed lost all other qualities and specific relationships—except that they were still human." See HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 299 (1979). Thus, in the nation-state system, human rights that are considered inalienable have become meaningless once they cannot be attached to the citizens of a nation-state. The refugee, the person who was supposed to be the "human rights" person *par excellence* has thus become the paradigm of 'bare life.'

319. A term coined by Gross in his analysis of Schmitt's theory of the exception. See Gross, *Exception and Emergency Powers*, *supra* note 306.

320. AGAMBEN, *supra* note 304, at 187-88.

321. WITHOUT DISTINCTION, *supra* note 228.

## III.

## CONCLUDING OBSERVATIONS: THE MATRIX OF AN ILLEGAL OCCUPATION AND ITS NORMATIVE CONSEQUENCES

In light of the above conclusion, one should revisit Israel's arguments regarding its security concerns and the measures taken to ensure that they are met.<sup>322</sup> It is beyond dispute that terrorist attacks present a major challenge to the conduct of normal life. This has become painfully evident in many parts of the world following 9/11. What should, however, be disputed is the equation Israel has drawn between the Palestinians and al-Qaeda, and indeed between the former and worldwide Islamic fanaticism. The Palestinians engage in a struggle for freedom by an occupied people; the latter is an amorphous and transnational group intent on destroying the democratic way of life. The Israeli equation lends support to the Israeli argument, discussed above, that the Palestinian response to Israel's most generous peace offerings at Camp David evidences Palestinian's lack of good faith engagement in the peace process and exposes their true motivation: the destruction of the only democratic state in the Middle-East, Israel. What is missing from the equation, however, is the occupation. The equation is thus self-serving as it allows for the obfuscation of the cause and effect relations which exist between this occupation and Palestinian violence. These relations do not justify terrorist attacks against civilians—there is no justification for such attacks—but they do contextualize them and refocus the attention on the nature of the Israeli occupation of the OPT.<sup>323</sup>

Furthermore, our argument regarding the illegality of the continued Israeli occupation of the OPT rests on the violation by Israel of the basic tenets of the normative regime of occupation. The various arguments advanced in support of Israeli actions in the territory in the name of security thus fail to overcome our argument. The question of whether a particular action by the IDF undertaken to advance Israel's security has violated certain rights of the protected population is distinct from the question of the illegality of the regime of occupation.

Focusing on the nature of this regime—as distinct from analyzing specific actions undertaken within it—reveals that obfuscation and the blurring of boundaries is the defining feature of the Israeli occupation. Its indeterminacy has operated to legitimize that which would have otherwise been determined illegal.

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322. This issue has been discussed *supra* in section II.4.d.iv.

323. The essential features of the occupation regime of the OPT date back to at least 1977, thus preceding both the second and the first *intifadas*, and making the assignment of blame for the failure of the peace process to the Palestinians, its accuracy notwithstanding, irrelevant to the present discussion. Note further that the period of the occupation consists of four segments: (1) 1967-1987 (first period); 1987-1993 (first *Intifada*); 1993-2000 (the Oslo peace process); 2000-present (the collapse of the peace process and the second *Intifada*). The establishment of the Palestinian Authority did not alter the fact of occupation, not least because Israel neither ceased to exercise effective control over the territories nor to allow the expansion, or "natural growth," of the settlements. See *Construction of a Wall*, *supra* note 6, ¶ 78. These facts have led some observers to compare the creation of the Palestinian Authority to the creation of Bantustans in Apartheid South Africa. See, e.g., CHRISTINE BELL, *PEACE AGREEMENTS AND HUMAN RIGHTS* 189, 190 (2000).

Thus, while Israel has consistently argued that the West Bank and the Gaza Strip are not occupied territories, the State's attorneys have sought to justify Israel's actions in the territories which restrict the rights of Palestinians on the basis of the law of occupation.<sup>324</sup> Similarly, the HCJ, while never confirming the applicability of the Fourth Geneva Convention to the territories, has nevertheless decided to apply its humanitarian provisions in a manner that has allowed the IDF to exercise the powers of a belligerent occupant but which rejected the vast majority of Palestinian petitions.<sup>325</sup> In this manner, Israel has been able to enjoy the credit for applying international humanitarian law while at the same time violating its essential tenets.<sup>326</sup> This occupation/non-occupation indeterminacy is complemented by its twin annexation/non-annexation indeterminacy: Israel acts in the territory as a sovereign insofar as it settles its citizens there and extends to them its laws on a personal and on a mixed personal/territorial bases, yet insofar as the territory has not been formally annexed and insofar as this exercise of sovereignty falls short of giving the Palestinian residents citizenship

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324. On the state's resort to the Geneva Conventions as a basis for exercising its powers, see generally the arguments advanced by KRETZMER, *supra* note 87, at 197.

325. On the jurisprudence of the HCJ, see KRETZMER, *supra* note 87, at 38. Two major issues where the court rejected Palestinian petitions and allowed the army to act in ways that *de facto* negated protections that the Geneva Convention sought to give, are deportations, and home demolitions. *Id.* at 49-52, 165-86, 145-63. In the context of both issues, the HCJ interpreted the Geneva Convention in a way that allowed the Israeli army to use these measures notwithstanding the specific prohibitions on them in the text of the Convention. This interpretation has been highly controversial. On the legitimizing function of the HCJ in rejecting over 99% of Palestinians petitions but accepting some which thereby become symbolic "Landmark cases," which legitimizes the authority of the HCJ without significantly affecting the rights of the Palestinians, see Ronen Shamir, *Landmark Cases and the Reproduction of Legitimacy: the Case of Israel's High Court of Justice*, 24 L. & SOC'Y REV. 781 (1990). A recent change in the direction of this jurisprudence should however be noted as it may well indicate a trend towards greater recognition of the humanitarian and human rights plight of the Palestinians, as is evidenced in the HCJ's analysis of the proportionality requirement in connection with the construction of the Wall. See H.C. 2056/04, *Beit Surik* case, *supra* note 103; H.C. 7957/04, *Mara'abe* case, *supra* note 103; H.C. 3239/02, *Mar'ab. v. The IDF Commander in Judea and Samaria* (not yet published) (applying human rights instruments to the occupied territories).

326. A credit noted particularly for its rarity, insofar as it has been the practice of occupying powers to deny the very applicability of the law of occupation. See Baxter, *Some Existing Problems*, *supra* note 35, at 288; Roberts, *Prolonged Military Occupation*, *supra* note 33, at 46. There is a difference, however, between admitting the relevance of and referring to international humanitarian law and applying it in a manner consistent with its purpose. While the HCJ does apply this law in a manner that occasionally has favored a Palestinian petition directly (and especially recently in the context of petitions against specific segments of the Wall) and, perhaps more significantly, indirectly, by exercising its "shadow" function to encourage the state to retreat from a contested action before a decision is rendered, it has not, in the main, applied this law in a manner that advances its main purpose. For an analysis of the "shadow function" of the court in this context, see Yoav Dotan, *Judicial Rhetoric, Government Lawyers and Human Rights: the Case of the Israeli High Court of Justice During the Intifada*, 33 L. & SOC'Y REV. 319 (1999); KRETZMER, *supra* note 87, at 189-91. For an example of a recent decision wherein the HCJ relied on the Geneva Convention in order to determine that Article 78 of the Fourth Geneva Convention authorizes the Military Commander to assign the residence of Palestinians from the West Bank to the Gaza Strip and that such assignment is distinct from the prohibition on deportation contained in Article 49 of the same Convention, see *Ajuri*, *supra* note 103. For reviews of this judgment, see Barak-Erez, *supra* note 263; Benvensiti, *Ajuri*, *supra* note 263; Ben-Naftali & Michaeli, *The Call of Abraham*, *supra* note 263.

rights, Israel is not acting as a sovereign.<sup>327</sup> In this manner, Israel enjoys both the powers of an occupant and a sovereign in the OPT, while Palestinians enjoy neither the rights of an occupied people nor the rights of citizenship. This indeterminacy allows Israel to avoid accountability in the international community for having illegally annexed the territories, while pursuing the policies of “greater Israel”<sup>328</sup> in the West Bank without jeopardizing its Jewish majority.<sup>329</sup> It is, finally, the blurring of the boundaries between the temporary and the indefinite,<sup>330</sup> and between the rule and the exception,<sup>331</sup> which has donned a

327. See *supra* section II.A.3. Indeed, Roberts notes that “Israel may see some advantage in the continuation of the status of occupied territory, because this arrangement provides a legal basis for treating the Arab inhabitants of the territories entirely separately from the citizens of Israel: such a view suggests that the law of occupation could potentially pave the way for a kind of *apartheid*.” Roberts, *Military Occupation*, *supra* note 33, at 272-73. For a description of a similar concern, see Roberts, *Prolonged Military Occupation*, *supra* note 33, at 79-80. The law of occupation may indeed pave the way for a kind of *apartheid*, but only to the extent that it will be interpreted as excluding the notion of illegal occupation. Indeed, in the context of the OPT, Joseph Weiler noted that the construction of Israel’s control of the territories as a belligerent occupation helped digest and perhaps prolong “a reality of *de facto* annexation, of occupation *ad infinitum* coupled with the luxury of not having to integrate the local population into the democratic processes of the occupying nation.” Weiler explains this by the fact that the law of occupation was created with short occupation in mind, and thus the present rules are not fit for an occupation which has lasted for over thirty years. Weiler, *supra* note 97, at 390. The legitimization Weiler points to is the consequence of a law of occupation which does not incorporate a notion of an occupation becoming illegal when it turns into a *de facto* annexation.

328. On the “Greater Israel” (*Eretz Isreal*/Land of Israel) ideology and its implications, see Baruch Kimmerling, *Between the Primordial and the Civil Definitions of the Collective Identity: Eretz Israel or the State of Israel?*, in *COMPARATIVE SOCIAL DYNAMICS: ESSAYS IN HONOR OF S. N. EISENSTADT* 262-83 (Eric Cohen et al. eds., 1985). The settlement project cannot be understood outside of this context as there is an overlap between the occupied territories and the historical and religious “Greater Israel.” See Baruch Kimmerling, *Boundaries and Frontiers of the Israeli Control System: Analytical Conclusions*, in *THE ISRAELI STATE AND SOCIETY: BOUNDARIES AND FRONTIERS* 265, 277 (Baruch Kimmerling ed., 1989).

329. It is interesting to note in this context that demography plays a significant role within Israel proper, especially with respect to its Palestinian minority. The latter, while enjoying the myriad of rights associated with citizenship, are nevertheless discriminated against, most notably with respect to land rights as they most directly pertain to the “judaization” process of the land of Israel. This process has led to the characterization of the Israeli regime as an “ethnic democracy”—a concept which appears to be an oxymoron—or as an “ethnocracy.” Placed in this context, the occupation regime attempts to replicate the same process by extending the ethnic regime which exists within Israel’s recognized borders. The result is an Israeli state whose existence as a democracy is put in doubt. On discrimination of Palestinians citizens of Israel with respect to land rights, see Alexander Kedar, *The Legal Transformation of Ethnic Geography: Israeli Law and the Palestinian Landholder 1948-1967*, 33 N.Y.U. J. INT’L. L. & POL. 923 (2001); Aeyal Gross, *The Dilemma of Constitutional Property Rights in Ethnic Land Regimes: Israel and South Africa Compared*, 121 S. AFRICAN L. J. (2004). On the concept of an “ethnic democracy,” see Sammy Smooha, *Minority Status in an Ethnic Democracy: The Status of the Arab Minority in Israel*, 13 ETHNIC & RACIAL STUD. 389-413 (1990). On the critique of this concept, see As’ad Ghanem et al., *Questioning “Ethnic Democracy”: A Response to Sammy Smooha*, 3 ISR. STUD. 253 (1998). On the alternative concept of “Ethnocracy,” see Oren Yiftachel, *‘Ethnocracy’: The Politics of Judaizing Israel/Palestine*, 6 CONSTELLATIONS 364 (1999). For a detailed discussion of this debate, see Aeyal Gross, *Democracy, Ethnicity and Constitutionalism in Israel: Between the “Jewish State” and the “Democratic State”*, 2 SOTSIOLOGIA ISRAELIT 647 (2000).

330. See *supra* section II.A.4.

331. See *supra* section II.B.

mantle of legitimacy on this occupation and has made possible the continuous interplay of occupation/non-occupation and annexation/non-annexation. This mantle, however, much like the Emperor's New Clothes, should not obfuscate our vision of the naked illegality of this regime.

"[T]he qualification of a situation as illegal," observed the ICJ, "does not itself put an end to it. It can only be the first necessary step in an endeavour to bring the illegal occupation to an end."<sup>332</sup> While law, in itself, is surely no substitute for statesmanship and cannot therefore "bring the illegal occupation to an end," there are normative results which do follow from illegality. A state "whose conduct constitutes an internationally wrongful act having a continuing character is under an obligation to cease that conduct, without prejudice to the responsibility it has already incurred."<sup>333</sup>

Further, the qualification of the occupation as "illegal," while it does not affect the continued application of both humanitarian and human rights law (so as to avoid a legal vacuum and to offer protection to the occupied population so long as the illegal situation persists), does affect the legality of the security measures taken in its defense—as distinct from measures undertaken to protect Israel itself—as such measures are thereby illegal themselves.<sup>334</sup> This consequence is relevant both to the legal assessment of various security measures undertaken by Israel, including but not limited to the Wall, and to the legal validity of the arguments raised within Israel by soldiers who refuse to partake in the defense of the occupation. Indeed, the perception of the Israeli occupation as illegal and illegitimate might well have been the main factor which informed the ICJ's perception of the Wall in the *Construction of a Wall* Advisory Opinion. While refraining from commenting on the occupation regime itself, the Court was well aware of the "greater whole" of which the Wall is but one aspect.<sup>335</sup> This might explain, for example, its off-hand rejection of Israel's self-defense argument, based on Article 51 of the UN Charter, on the ground that Israel was not reacting in response to force used by another state but rather to force emanating from within its territory in light of the control it is exercising in the OPT.<sup>336</sup>

It may, however, be possible to construe additional normative consequences emanating from an indefinite occupation which, as discussed above,

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332. *Continued Presence of South Africa in Namibia* Advisory Opinion, *supra* note 21, at 52.

333. DRAFT ARTICLES ON STATE RESPONSIBILITY, art. 43, Report of the ILC on the Work of its 48th session, U.N. GAOR, 51st Sess., Supp. No. 10 at 142, U.N. Doc. A/51/10 (1996).

334. The argument does not propose that actions taken in an armed conflict are to be measured in relation to the question of whether the original use of force was legal or not. Indeed, such an argument would have blurred the important distinction between *jus ad bellum* and *jus in bello*. It merely argues that actions undertaken in defense of an illegal occupation are illegal themselves.

335. *Construction of a Wall*, *supra* note 6, ¶ 54.

336. *Id.* at ¶ 139. It is this assumption that raised the objection of several judges who felt the Court did not take fair notice of the illegal acts performed by the Palestinians and thus disregarded the context of the question at hand. See *id.* Separate Opinion of Judge Higgins, ¶¶ 15-18; Declaration of Judge Burgenthal, ¶¶ 3-6; Separate Opinion of Judge Owada, ¶¶ 26-29, 31.

necessarily constitutes an assault on both sovereign integrity and fundamental human rights. Such an occupation defies the basic tenets of both the laws of occupation and the normal order of the international society. The time has come for the international community to promulgate clear time limitations for the duration of an occupation, thereby offering a solution to the problem identified in, but not resolved by, Article 6 of the Fourth Geneva Convention.<sup>337</sup> The international community may wish to entertain the thought that, in cases of occupations lasting longer than a year, and pending a comprehensive political solution, the effective control over the occupied territory be transferred from the occupying power to an appropriate international authority.<sup>338</sup> It may further wish to consider the possibility that a refusal by an occupying power to thus transfer control be construed as a form of aggression.<sup>339</sup> Indeed, the rationale underlying the criminalization of aggression, that is, that it is a framework for an entire body of international crimes, as explained by the Nuremberg International Military Tribunal, seems to apply here as well.<sup>340</sup> This notion is, perhaps, somewhat baffling and difficult to accept, given the nearly axiomatic conception of occupation as a fact of life.<sup>341</sup> But, then, was not aggression, too, before WWII, perceived as an acceptable albeit regrettable fact of life regulated by the Covenant of the League of Nations?<sup>342</sup>

Whether or not the international community decides to deter similar in-

337. See section II.A.4.b.

338. See Ben-Naftali, *Temps Perdu*, *supra* note 256.

339. The International law definition of aggression is yet undecided. While criminalized in Article X of the Nuremberg Charter as a 'crime against peace,' see Charter of the International Military Tribunal and Protocol of 6 October 1945, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, it was not properly defined therein. Since then, the international community has struggled to define the phenomenon. See G.A. Res. 3314, U.N. GAOR, 29th Sess., Definition of Aggression, Annex, Definition of Aggression, U.N. Doc. A/Res./3314 (XXIX) (1974). Under Resolution 3314, "aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations." *Id.* This definition, however, applies only as far as state responsibility goes. No consensus exists as to the definition of aggression as a crime. For this reason, while enumerated as one of the crimes under the jurisdiction of the ICC, as stipulated in Article 5(1)(d) of the Rome Statute, Article 5(2) provides for the suspension of such jurisdiction until a definition is agreed upon by state parties. See generally Grant M. Dawson, *Defining Substantive Crimes Within the Subject Matter Jurisdiction of the International Criminal Court: What Is the Crime of Aggression?*, 19 N.Y.L. SCH. J. INT'L & COMP. L. 413 (2000).

340. An aggressive war is "essentially an evil thing . . . . To initiate a war of aggression . . . is not only an international crime; it is the supreme international crime differing only from other war crimes in that it *contains within itself the accumulated evil of the whole*." See OFFICE OF THE UNITED STATES CHIEF OF COUNCIL FOR PROSECUTIONS OF AXIS CRIMINALITY, 1 NAZI CONSPIRACY AND AGGRESSION 16 (1946) (emphasis added).

341. Support for this position is found in Separate Opinion of Vice-President Ammoun, *Continued Presence of South Africa in Namibia* Advisory Opinion, *supra* note 22, at 89-92.

342. See PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 306, 307-09 (7th ed. 1997). Article 12(1) of the Covenant established a procedure by which parties to a dispute should settle their differences before resorting to war. They had to submit the dispute to arbitration or judicial settlement or to inquiry by the Council and "agree in no case to resort to war until three months after the award by the arbitrators or the judicial decision, or the report by the Council."



stances where the boundaries between the rule and the exception become blurred, leading to the *nomos* of occupation by taking any of the measures recommended above, remains “a perpetual possibility only in a world of speculation.”<sup>343</sup> Such speculation is clearly outside the scope of the present paper. It suffices to note that the materialization of such a possibility, much like the carrying out of the normative consequences which currently do follow from the illegality of the occupation or the construction of the Wall, cannot on their own eliminate the Israeli-Palestinian conflict. When coupled with wise and decent statesmanship, however, they may well assist in its resolution.

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343. In reference to T.S. Eliot's poem which is cited at the beginning of the paper.